Supreme Court, U.S.
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92-783
No.

In The

Supreme Court of the United States

October Term, 1992

DALLAS & MAVIS FORWARDING CO., INC.,

Petitioner,

vs.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED*

Whether a federal court may vacate an arbitration award where the award is based on an interpretation of the collective bargaining agreement which is beyond the scope of the arbitrator's authority under the agreement?

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* All parties to the proceeding in the court below are listed in the caption.

LISTING OF COMPANIES AND AFFILIATES OF RESPONDENT

Pursuant to Rule 28.1, Respondent sets forth the following information. Respondent is a subsidiary of Dallas & Mavis Forwarding Co., Inc. and Jupiter Corp. Transportation System, a privately held corporation.

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No.

In The

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October Term, 1992

DALLAS & MAVIS FORWARDING CO., INC.,

Petitioner,

vs.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Dallas & Mavis Forwarding Co., Inc. petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying the request for rehearing *en banc* is not reported and is reprinted as Appendix A at pages 1a to 2a of the

Appendix to this Petition[1] (App. 1a-2a). The court of appeals' decision is reported at 972 F.2d 129 and is reprinted at Appendix B at pages 3a-17a.

The judgment of the United States District Court for the Western District of Kentucky accepting the Findings of Fact, Conclusions of Law and Recommendations is unreported and is reprinted as Appendix C at pages 18a-19a. The Magistrate's Findings of Fact, Conclusions of Law and Recommendations are unreported and are reprinted as Appendix D at pages 20a-46a. The opinion and award of the Board of Arbitration is unreported and is reprinted as Appendix E at pages 47a-81a.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion and judgment on August 5, 1992. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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1. References to "App. __" are to the Appendix to the Petition.

STATEMENT OF THE CASE

A. Facts

Petitioner Dallas & Mavis Forwarding Co., Inc. ("D&M") is engaged in the delivery of heavy duty truck tractors primarily by the driveaway method where tractors are "piggy backed." Since approximately 1986, D&M had been utilized by Ford Motor Company to deliver newly manufactured tractors from its Louisville, Kentucky truck manufacturing facility to the Western United States by driveaway method (App. 58a). General Drivers Local No. 89 ("Local 89") has represented the employees of D&M and other companies engaged in the transportation of newly manufactured motor vehicles and trucks from Ford's manufacturing facilities in Louisville (App. 4a).

D&M and Local 89 were signatory to a collective bargaining agreement which contained a mandatory grievance and arbitration procedure set forth in Article 7 (App. 4a). The arbitration procedure utilized the concept of joint arbitration committees comprised of representatives from companies and local unions not involved in the particular dispute. The highest level of the joint arbitration committee procedure is the National Committee. If the National Committee were to deadlock on a grievance, it would be referred to a Board of Arbitration ("Board") in accordance with Article 7, 9 (App. 7a, 31a-32a).

The Board is comprised of two representatives, appointed by the company and union respectively, who, in turn, appoint a third disinterested arbitrator. Under Article 7, § 9, the Board has the authority to interpret and apply the provisions of the National Agreement and Supplemental Agreements, where appropriate, but does not have the authority to amend or modify the National or Supplemental Agreements or to establish new terms and conditions of employment under the agreements (App. 32a).

In October of 1989, Ford solicited bids for the handling of its traffic from the Kentucky Truck Plant ("KTP") as well as the Louisville assembly plant operation. D&M submitted bids in response to this notice with respect to the KTP business. Ford awarded D&M the third party release and saddle mounting operations ("decking")[2] and the "off rail" traffic for delivery in the Western United States and Western Canada. D&M had lost the business to Allied System of delivering trucks to the upper Midwest (App. 6a).[3]

In reviewing its operations in light of the new traffic awarded from Ford, D&M planned to allow its drivers who had been utilized in the upper Midwest operation to use seniority to move into the newly acquired decking operation (App. 6a, 24a). D&M believed that the impact on Allied would be eased because of Allied's re-acquisition of the upper Midwest traffic. D&M also took the position that under the guidelines of seniority transferability which implemented Article 26 of the collective bargaining agreement, its employees would have the first opportunity to fill the newly opened positions (App. 24a, 65a, 67a).

The 1990 bid affecting the KTP operations in Louisville was a part of a larger bid procedure involving Ford's re-distribution of its traffic throughout the Eastern, Central, and Southern United States. Dallas & Mavis and Allied requested the National Committee to establish seniority rights under Article 5 and under any other applicable National or Supplemental provision relating to the Ford distribution of business at the KTP facility. The seniority issues were presented to the National Committee at a special meeting held in March of 1990 (App. 7a).

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2. Decking is the process of mounting the trucks in piggyback fashion for delivery. Employees involved in this process work in the garage or in the yard where the units are held for decking.

3. Allied had been delivering trucks from Ford's KTP facility from the early 1980's and been performing the decking functions (App. 4a, 6a).

Representatives of D&M, Allied and Local 89 presented their positions to the National Committee. D&M took the position that since Allied and it remained as employers at the KTP facility and since both carriers were affected by the allocation of business by Ford, neither Article 5, § 4(c) nor Article 5, § 5(a) were applicable since no cancellation of a shipper occurred at the KTP facility (App. 24a-25a).[4] The company asserted that under seniority transferability, it was obligated to offer the yard vacancies to its employees at the KTP terminal (App. 24a-25a).

Local 89, through its representatives, requested that the National Committee consider the appropriate seniority application and suggested specific provisions. The National Committee was unable to render a decision and the deadlocked matter was referred to a Board of Arbitration ("Board") in accordance with Article 7, § 9 (App. 7a, 61a).

A hearing was conducted by the Board in Louisville on September 24, 1990. The parties presented their proofs to the Board through witnesses and exhibits (App. 56a-68a). The Board's Opinion and Award was issued in December of 1990. The Board's decision was not unanimous. The majority found that D&M had violated the 1988 agreement when it failed to merge its KTP seniority list with the seniority list of employees laid off by Allied who had worked in the yard and mounting jobs (App. 76a). D&M was required to prepare a merged seniority list on the basis of the

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4. Article 5, 4(c) provides that seniority lists are to be dovetailed where two or more employers share traffic from the same shipper at the same location and the traffic of one employer is cancelled and assigned to one of the remaining employers (App. 28a-29a).

Article 5, § 5(a) provides for a dovetail of seniority when a shipper cancels its business relationship with an employer at a location and transfers all or part of the business to another employer which is not servicing that shipper at that location (App. 29a-30a).

employees' respective KTP terminal seniority as of March 5, 1990 and to offer jobs in its decking operations to employees on the merged list in seniority order.[5] The company was further obligated to make whole all former Allied employees who accepted the job offer.

The Board majority admitted that it was clear that the facts did not fall squarely within the coverage of Article 5, § 5(a) (App. 71a). The majority stated that whether Article 5, § 4(c) applied was less clear in light of two plausible interpretations. The Board majority stated that it did not need to determine which of the two applications was correct since it could utilize Article 5, § 8 (App. 72a).[6]

The Board majority considered the language of Article 5, § 8 as authority for it to extend the concept of Article 5, § 4 to "partial" closings. In addressing the language of Article 5, § 4(c), the majority stated that it was "highly doubtful" that the drafters of the 1988 National Agreement intended a different result to arise from "total" versus "partial" cancellations (App. 10a). This interpretation was reached despite the specific reference to "partial" closings in Article 5, § 7(b) (App. 10a).

B. Proceedings Below

D&M filed a complaint on February 15, 1991, seeking to have

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5. The practical affect was to place the laid off Allied employees ahead of the D&M employees on the merged seniority list since they had greater KTP seniority.

6. Section 8 provides, in part, that the employers, unions, and National or Area joint arbitration committees may mutually agree to the disposition of seniority issues. In addition, the National and Area joint committees have the authority to determine the establishment and application of seniority in all situations presented to them. No mention of the Board is made in § 8 (App. 9a).

the Board of Arbitration's Opinion and Award vacated. Both D&M and Local 89 filed motions for summary judgment. The district court referred the motions to the magistrate for determination, and the magistrate issued its Findings of Fact, Conclusions of Law and Recommendations on March 28, 1991. D&M filed objections to the magistrate's findings, and the district court issued its judgment on November 4 accepting the magistrate's recommendations as filed.

The magistrate reviewed the facts and collective bargaining agreement provisions referred to by the parties in their motions for summary judgment (App. 21a-25a). The magistrate specifically noted the limitation on the Board's authority and further noted that under Article 5, § 8 of the National Agreement, the National and Area Joint Arbitration Committees are given the authority to determine the proper application of seniority in situations presented to it (App. 38a-39a). The magistrate also referred to the decisions in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

The magistrate determined that the Board award drew its essence from the collective bargaining agreement and that the Board based its decision upon its reading of the contract. The magistrate noted that the Board examined the language and compared it to the positions of the parties. The magistrate concluded that the Board's reading of the contract was permissible and supported by the facts (App. 44a).

D&M filed its appeal with the Sixth Circuit which affirmed. The court reviewed the facts and underlying contractual provisions relevant to the determination (App. 4a-11a). The court also reviewed this Court's decisions in *Enterprise Wheel* and *Misco* and reviewed its prior decision in *IBEW, Local No. 1842 v. Cincinnati*

Electronics Corp., 808 F.2d 1201 (6th Cir 1987) with respect to the standards to be utilized to determine whether or not an award draws its essence from a collective bargaining agreement.

The court next addressed the issue of the Board's interpretation of Article 5, § 4. The court noted that the Board considered possible interpretations of that provision, and the court stated that while it may disagree with the interpretations, it could not review them as erroneous interpretations. The question of interpretation was, thus, left to the arbitrator's legitimate discretion (App. 14a). The court stated that the issue of whether the Board was empowered under Article 5, § 8 to render its interpretation was bolstered by the language of that provision.

The court next addressed D&M's argument that the collective bargaining agreement only authorized the National Committee and Area joint committees to use the extremely broad powers contained in § 8. The court stated that the Board tailored its award as closely as possible to the language of the agreement and of prior interpretations of the National Committee. The court again stated that while it may disagree with the interpretation, it could not dispute that this was one of several rational interpretations and, therefore, could not reject this "plausible" interpretation (App. 15a). The Board's determination that its opinion was within its authority to interpret and apply the agreement was considered by the court to be within the informed judgment of the arbitrators and was the remedy for which the parties had specifically bargained (App. 16a).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS THE IMPORTANT QUESTION OF WHETHER AN ARBITRATOR CAN PRECLUDE COURT REVIEW OF HIS/HER DETERMINATION OF AUTHORITY TO ISSUE AN AWARD BY IGNORING EXPRESS CONTRACTUAL LIMITATIONS UPON ARBITRAL AUTHORITY UNDER THE GUISE OF INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT.

The parameters for review of an arbitration award by the federal courts have been established by this Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Since the question of interpretation of the collective bargaining agreement is a question for the arbitrator, this Court held that courts have no business overruling an arbitrator concerning construction of the contract because the court's interpretation of the agreement is different from the arbitrator's. *Id.* at 599. This Court stated, however, that an arbitrator is confined to the interpretation and the application of the collective bargaining agreement, and that he does not "dispense his own brand of industrial injustice." An arbitrator's award is legitimate so long as it "draws it essence" from the collective bargaining agreement. When an arbitrator fails to uphold this obligation, the courts are to refuse enforcement of the award. *Id.* at 597.

A reviewing court is thus confronted with two apparently conflicting principles. An arbitrator is allowed broad discretion and independence and is the "contract reader."[7] At the same time, a court is authorized under *Enterprise Wheel* to, in effect, apply its

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7. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1138 (1977); *see also*, Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 Mo. L. Rev. 243 (1987).

own interpretation to declare that the arbitrator inappropriately applied the wrong "brand" of industrial justice.

This Court once again addressed the proper scope of judicial review in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). This Court stated in part with respect to the vitality of the standard announced in *Enterprise Wheel*:

> As the Court has said, the arbitrator's awards settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 38.

The lower courts have struggled, and continue to struggle, with their proper role in the review of an arbitration decision even after *Misco*. For example, in *Local 120, Int'l Molders, et al. v. Brooks Foundry, Inc.*, 892 F.2d 1283 (6th Cir 1990), the Sixth Circuit stated that the task of judicial review in cases involving arbitration decisions is "never an easy one." *Id.* at 1289. The court stated that if a principle were to be drawn from its reinstatement of the arbitration awarded the principle is that in light of *Misco*, in close cases, the decision of the arbitrator must be accorded controlling respect. *Id.* at 1289.

As parties to collective bargaining agreements continued to challenge the validity of arbitration decisions rendered under the

authority of those agreements, these challenges have led to results which are troubling to the parties. Compare, for example, *Florida Power Corp. v. IBEW Local 433*, 847 F.2d 680 (11th Cir 1988) where the appellate court reinstated an arbitration award that found the discharge of an employee arrested on drug possession charges to be "too severe" with *S.D. Warren Co. v. United Paperworkers Local 1069*, 846 F.2d 827 (1st Cir 1988) where the court upheld the vacation of an award reinstating an employee who violated a company rule prohibiting possession of marijuana on plant premises. Indeed, the task of the review of arbitration decisions has been called "one of the more difficult and standardless enterprises facing an appellate judge." *Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1170 (6th Cir 1990).[8]

The appellate court in this case stated it could not review the interpretations of § 4(c) as erroneous even if it disagreed with them since it presented a question of interpretation which, under *Enterprise Wheel*, must be left to the arbitrator's legitimate discretion (App. 14a). In considering D&M's challenge to the Board's ability and authority to utilize § 8 of Article 5, the court noted that the *Board* determined that its "opinions" were within its authority to interpret and apply the agreement and was also within the "informed judgment" for which the parties had bargained (App. 16a). The court stated that the result in this case is a "far cry" from those cases in which the arbitrator totally disregarded plain language of the contract or administered a personal brand of industrial justice citing *Ficks Reed Co. v. Allied Industrial Workers Local 112*, 965 F.2d 123 (6th Cir 1992) and *IAM Lodge 2770 v. Lourdes Hospital, Inc.*, 968 F.2d 154 (6th Cir 1992).

Contrary to the court's analysis, a review of *Ficks Reed* and

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8. In his dissenting opinion, Judge Boggs stated that prior to *Misco* the rule with respect to review seemed to be that the arbitrator was always right. After *Misco*, the rule seemed to be that even when the arbitrator was wrong, he was still right. *Id.* at 1171.

Lourdes Hospital does not establish that the facts herein are a "far cry" from the facts in those cases. In *Ficks Reed*, the court stated its review was limited to determining whether the arbitrator was arguably construing the agreement. Since the arbitrator ignored the applicable language, his award failed to draw its essence from the agreement. In *Lourdes*, the court found the award did not meet the standard of review under *Misco* because the arbitrator created a term and thereby administered his own brand of industrial justice.

The court considered itself to be precluded from reviewing the interpretation without ever addressing the threshold issue of whether the Board had authority to use § 8. Absent that authority, the Board was dispensing its own brand of industrial justice.[9] The problem which exists in the lower court's exercise of the review function in light of *Misco* arises since it deferred to the arbitrator's interpretation of contract provisions without addressing the issue of whether the Board was authorized in the first instance to act or to interpret.

Since there is to be review, under this Court's decision in *Enterprise Wheel*, there must be some boundary across which an arbitrator's decision will not be upheld. The concern with a reviewing court's substitution of its own interpretation for that of an arbitrator because of the court's feeling that the arbitrator's interpretation is "wrong" or that the court's interpretation is "better" takes into account entirely different considerations than a court piercing an arbitrator's interpretation which is not founded on ambiguous language subject to interpretation or where the interpretation is the only basis for authority not otherwise granted under the agreement. The policy concerns which this Court

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9. Since the Board had no authority to participate in what could be considered a quasi-negotiation function under § 8, its role was limited to determining whether a basis existed under the other provisions of Article 5 to warrant the dovetail of seniority.

announced in *Enterprise Wheel* for the resolution of labor disputes by arbitration is not threatened when a court ascertains that the interpretation is not necessary since there is nothing to interpret or since there is no authority to interpret. In such a case, the award falls beyond the parameters of the "arguably construing or applying" as set forth in *Misco* and fails to draw its essence from the collective bargaining agreement.

This case provides the opportunity for this Court to delineate the reconciliation of two apparent competing principles with respect to arbitration review embodied in *Enterprise Wheel* and *Misco*. On the one hand, a court is not to overturn a decision provided the arbitrator is even *arguably* construing or applying the contract. On the other hand, an award settling a dispute with respect to interpretation or the application of a labor agreement must draw its substance from the contract and cannot simply reveal the arbitrator's own notions of industrial justice. *Id.* at 38. Since, in reality, a reviewing court must review a party's collective bargaining agreement as well as the arbitrator's adherence to that agreement, any court that enforces or vacates an arbitration decision on the grounds that it does or does not draw its essence from the agreement has, in effect, substituted its interpretation of the contract.[10]

If an "interpretation" serves as nothing more than code words to repel judicial review of the underlying decision, form is truly elevated over substance. An arbitrator may not shield "an outlandish disposition of a grievance" from judicial review "simply by making the right noises — noises of contract interpretation." *Leed Architectural Products. Inc. v. United Steelworkers of America Local 6674*, 916 F.2d 65 (2nd Cir 1990).

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10. See, LeRoy and Feville, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 12 Indus. Rel. L.S. 78, 96 (1991).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 17, 1992 DENYING PETITION FOR REHEARING EN BANC

No. 91-6421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DALLAS & MAVIS FORWARDING CO., INC.,

Plaintiff-Appellant,

v.

GENERAL DRIVERS LOCAL UNION NO. 89; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants-Appellees.

ORDER

BEFORE: MERRITT, Chief Judge; KEITH and RYAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

Appendix A

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 5, 1992

No. 91-6421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DALLAS & MAVIS FORWARDING COMPANY, INC.,

Plaintiff-Appellant,

v.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed August 5, 1992

Before: MERRITT, Chief Judge; and KEITH and RYAN, Circuit Judges.

MERRITT, Chief Judge. The majority of an arbitration board determined that the plaintiff violated provisions of a collective bargaining agreement by refusing to merge its seniority list with the list of another employer that laid off workers after a

loss of business in the wake of a major contract revision. The plaintiff sought to have the award for the defendant vacated by the District Court. We agree with the court that the arbitration board's award was rationally drawn from the essence of the collective bargaining agreement, and so we affirm the grant of summary judgment to the defendant.

I.

Plaintiff Dallas & Mavis [hereinafter "D&M"] delivers trucks and other vehicles from manufacturers to distribution points nationwide and in Canada. Like other employers engaged in the vehicle transshipment industry, D&M entered into a national collective bargaining agreement [hereinafter "Agreement"] with the principal union involved in this industry, the Teamsters, as well as a local supplemental agreement. D&M had an existing contract with the Ford Motor Company at its Louisville, Kentucky Truck Plant [hereinafter "KTP"] for a share of Ford's truck transshipment business from that plant. The defendant, Teamsters Local No. 89, represents the members of KTP's collective bargaining unit in this industry.

During the 1980s three companies were engaged by Ford to deliver completed trucks from KTP. These were D&M, which specialized in delivery by the "driveaway" (*i.e*, the "piggyback" mounting of one tractor onto another, with the lower vehicle as prime mover for both) method of shipment; Allied Systems, Inc. [hereinafter "Allied;" formerly known as Motor Convoy, Inc.], which transported trucks by the "truckaway" (loading onto tractor-driven trailers) method; and Transport Storage, Inc. [hereinafter "Transport"], which shipped trucks solely by railcar. During the early 1980s D&M shipped Ford trucks to the western portions of the United States and Canada. By mid-decade, it sought to expand

its market into Transport's own delivery sector in the West and Canada.

In 1988 Ford announced that it would open rebidding on its existing KTP transshipment contracts. D&M entered its bid for what was heretofore Transport's rail deliveries, while also placing bids for the truckaway and driveaway methods. Ford awarded D&M a contract for motor deliveries into the Midwest, 11 western states and Canada, while Allied won its bid for pre-shipment preparations for KTP's trucks. D&M, however, had insufficient facilities in Louisville to cope with its burgeoning program. It thus was forced to look elsewhere for employees to staff the expanded routes. Transport's KTP employees were left jobless because all of its railhead operations there were eliminated in the recontracting process.

D&M entered discussions with the defendant about the company's projected staffing needs for the new operations. The plaintiff reasoned that it was obligated under the Agreement to offer the new job vacancies first to the laid-off Transport employees. Only after those positions were filled would D&M then create new positions for 14 Allied workers who had also been laid off in the wake of rebidding. Teamsters Local No. 89 disagreed, and it filed grievances on behalf of only Allied's and Transport's employees with the National Joint Arbitration Committee [hereinafter "Committee"]. These grievances required consideration at two Committee sessions in April and October 1988.

The Committee determined at the April meeting that the Agreement's provisions were not fully applicable. Instead of "canceling" Allied as a shipper, Ford's rebidding merely required realignments in Allied's service territories. Nevertheless, the Committee required the 14 laid-off Allied workers to be

incorporaated into D&M's work force, thus allowing them to "follow the work," *i.e.*, to allow them to transfer freely between employers performing essentially the same tasks. This principle was identified as a relatively common practice in the vehicle transportation industry.

This issue arose anew at the Committee's October 1988 meeting, coupled with a related seniority issue. D&M's employees objected that Local 89 had not informed them about the two grievances submitted to the Committee in April, and they contended that this violated their rights to adequate notice. Transport's employees likewise requested a transfer with full seniority rights to Allied. Allied denied these transfers on the grounds that their former employment in the rail yard was not so substantially similar to Allied's as to allow Transport's employees to "follow the work." Based on evidence that Allied was contemplating expansion, the Committee modified its April decision: D&M would no longer be required to provide positions on its seniority list to Allied's 14 employees. Separately, the Committee rebuffed the Transport employees' efforts to "follow the work" to either D&M or to Allied.

In October 1989, Ford again solicited bids on the KTP shipping operations as part of a wholesale redistribution of traffic in the eastern, southern and central United States. D&M now placed bids upon the "decking" (preshipment preparations) process, which it won from Allied. D&M also received part of its driveaway bid, while losing its upper Midwest routes to Allied. D&M prepared its new staffing plans in part upon the two 1991 Committee decisions. It anticipated that Allied's employees would not have a right to have their seniority merged with D&M's KTP seniority list. D&M offered the new decking jobs to its own drivers and employees at other facilities, as well as to some non-union workers. It also refused to hire any of Allied's laid-off workers.

Appendix B

D&M and Allied filed motions to establish seniority rights with the Committee in March 1990. These focused upon Article 5 (concerning the "dovetailing," or merger, of seniority rights) and Article 26 (governing the transfer of seniority rights). The Committee, however, was soon deadlocked on what should be the correct resolution. To break the impasse, the issue was referred by the Committee to a board of three professional FMCS arbitrators — one picked by the union, one by the employer, and a disinterested third arbitrator selected jointly by the other two — under Article 7, § 9.[1]

The arbitrators rendered an opinion and award in December 1990. The majority held that D&M had violated the Agreement in refusing to merge its KTP seniority list with Allied's list of laid-off employees. The board scrutinized Article 5, 2, which expressed a preference for merger of employee seniority rights under the Agreement,[2] and Article 5, § 4(c), which addressed the circumstances under which an employer's business is "cancelled"

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1 Article 7, § 9 provides that if a dispute becomes deadlocked by the Committee, the Committee shall submit the grievance to a three-member board of arbitration. The language of subsection (b) is particularly pertinent:

> The arbitrator shall have the authority to interpret and apply the provisions of this Agreement or Supplements thereto, where appropriate, but shall not have the authority to amend or modify this Agreement or Supplements ... or establish new terms and conditions ....

2 That section states in relevant part: "Terminal seniority rights for all employees covered by this Agreement shall prevail, unless the Supplements or other provisions of this Agreement provide specifically to the contrary" (emphasis added).

by the shipper and when the canceled employers workers could then be reassigned to a "remaining" employer.[3] In contrast stood Article 5, § 5(a), which required a shipper to cancel its business with an employer and then to transfer part or all of that work to another employer not doing business at the shipper's present location before dovetailing occurred.[4] The majority of the board

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3 Article 5, § 4(c) states:

> Seniority lists are dovetailed . . . (c) [w]hen two (2) or more Employers share traffic from the same shipper at the same location, excluding port facilities, and the traffic of one (1) of the Employers is cancelled by the shipper and it is assigned to one (1) of the remaining Employers, whether or not there is a financial transaction of any kind involving the affected Employers . . . .

4 That article provides:

> In the event a shipper cancels its business relationship with an Employer at a location excluding port facilities, and transfers all or part of that business to another Employer which is not servicing that shipper at that loction, whether or not there is a financial transaction of any kind involving the affected Employers, both the active and laid-off employees of the cancelled Employer at that terminal and the laid-off employees of the succeeding Employer who choose to accept employment opportunity at the affected location shall be placed in a master dovetailed seniority list in accordance with their company seniority. The succeeding Employer shall afford work opportunities to the employees on that master seniority list in order of their seniority.

reconciled these distinctions by examining Article 5, § 8, [5] stating that the rules suggested in the Agreement were meant only as illustrative guidelines and that the National Arbitration Committees were empowered by the Agreement to determine seniority questions.

The two majority arbitrators determined that the facts of the case fit more squarely under the ambit of § 4(c) than under § 5(a) or any other sections. They recognized that two possible interpretations could be accorded to § 4(c): either the subsection was inapplicable because Ford did not "cancel" all of Allied's traffic at KTP, or it was applicable because Allied "retained" some traffic — albeit of a different kind from its past operations — at KTP after Ford's 1990 renegotiations. While either intepretation might be correct, however, the majority interpreted Article 5, § 8 as

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5 Article 5, § 8 provides as follows:

> The parties acknowledge that the above rules are intended solely as general standards and further agree that many factual situations may be presented to the Committee which necessitate modification or amendment in the application of these rules to specific factual cases . . . . Accordingly, the Employers and the Union acknowledge that questions involving the accrual, interpretation or application of seniority rights may arise which require different treatment. It is understood that the Employers, the Union and the National or Area Joint Arbitration Committees may mutually agree to such disposition of questions of seniority . . . . The National and Area Joint Arbitration Committees shall have the authority to determine the establishment and application of seniority in all situations presented to them and the seniority decisions of the Joint Arbitration Committee shall be final and binding . . . .

authorizing them to extend that subsection's application to encompass the change in Allied's operations:

> [E]ven if the [arbitration board] were to determine that the facts of the present case fell outside the literal meaning of subsection 4(c), it would be proper to extend application of that subsection in accordance with section 8 of Article 5.

Arbitration Opinion and Award at 28, The board concluded that if Article 5, § 4(c) established only a guideline, it was "highly doubtful" that the Agreement's drafters would have intended for different results to arise from total versus partial cancellations of an employer's business. This interpretation was reached despite Article 5, § 7(b)'s specific reference to "partial" closings.[6] The majority held that D&M had violated the Agreement, and it ordered D&M to draft and implement a seniority list dovetailing the laid-off workers into its work force; to offer jobs to those employees on the dovetailed list commensurate with their seniority; and to make whole Allied's employees who accepted those jobs.

The plaintiff sought to have the arbitration award vacated by

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6 That section states:

> When a terminal is closed or *partially* closed . . . a sufficient number of employees necessary to perform the transferred work shall have the right to transfer to the terminal into which the work was transferred, if regular work is available [*i.e.*, follow the work]."

(Emphasis added).

the Western District of Kentucky under section 301of the Labor Management Relations Act, 29 U.S.C. § 185, and jurisdiction was invoked under 28 U.S.C. § 1337. The Magistrate Judge recommended that the defendant's motion for summary judgment be granted. Citing the Supreme Court's *Steelworkers Trilogy*[7] and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Magistrate concluded that the board was within its authority when it construed the terms of the Agreement, and that the board rendered an award drawn from the Agreement's essence. The District Court accepted the Magistrate's recommendations and entered summary judgment for the defendant.

II.

Appellate courts review a grant of summary judgment *de novo. See, e.g., International Ass'n of Machinists v. Lourdes Hospital*, 958 F.2d 155, 156 (6th Cir. 1992); *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is therefore entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. P. 56(c).

The essential sources for appellate review of an arbitrator's decision are the Supreme Court's *Steelworkers Trilogy* and its more recent decision affirming those cases in *Misco*, 484 U.S. at 29. In *Misco*, the Court held that the authority possessed by appellate courts in reviewing arbitration awards is strictly limited

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7 *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfgr. Co.*, 363 U.S. 564 (1980).

to determining whether the arbitrator was "arguably construing or applying the contract and acting within the scope of his authority." *Id.* at 38.

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or misinterpretation of the contract. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate. *Id.*, at 597.

Misco, 484 U.S. at 36. *See also AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50 (1986); *AP Parts Co. v. United Auto. Workers*, 923 F.2d 488, 491 (6th Cir. 1991); *Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1168-69 (6th Cir. 1990). "When the grievance procedure has been exhausted, the courts have nothing left to do but enforce the award. Courts are bound by the arbitrator's findings of fact and do not function as appellate courts or courts of review, but serve only to enforce the arbitrator's award." *IBEW, Local 429 v. Toshiba America, Inc.*, 879 F.2d 208, 209 (6th Cir. 1989).

The need for judicial deference to an arbitrator's choice of

interpretation was explained by the Supreme Court in *Enterprise Wheel & Car,* one of the *Trilogy* cases, as follows:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which [sic] was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Enterprise Wheel & Car, 363 U.S. at 599. Nevertheless, the arbitrator's discretion in interpreting the collective bargaining agreement is also strickly circumscribed:

> [The arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597. *See also IBEW, Local No. 1842 v. Cincinnati Electronics Corp.*, 808 F.2d 1201, 1203 (6th Cir. 1987). An award fails to derive its essence from the agreement when (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on "general considerations of fairness and equity" instead of the exact terms of the agreement. *National Gypsum Co. v. United Steelworkers of America,* 793 F.2d 759, 766 (6th Cir. 1986) (citations omitted). *See generally Cincinnati Electronics,* 808 F.2d

at 1203-04. The issue to be resolved here is whether the arbitration board drew the essence of its award from the collective bargaining agreement. We are satisfied that this was done.

The plaintiff contends that the arbitrators ignored the plain language of the Agreement, thereby violating the first factor of *National Gypsum.* It first points to the board's interpretation of Article 5, § 4(c) and argues that, to reach its conclusion, the majority disregarded § 4(c)'s plain language concerning two or more employers "sharing" traffic from the same shipper. The board, however, considered this in its discussion of the possible interpretations of that subsection. While we may disagree with these interpretations of the subsection, we cannot review them as erroneous interpretations. *See AP Parts,* 923 F.2d at 491. Thus, this is a question of interpretation left to the arbitrators' legitimate discretion. *See, e.g., Enterprise Wheel & Car,* 363 U.S. at 597. That this authority was within the sound discretion of the board is bolstered in part by the first sentence of Article 5, § 8, which specifies by its terms that the rules contained within that article "are intended solely as general standards." This, however, does not completely resolve the plaintiff's challenge.

The plaintiff further contends that the majority of the arbitrators erred in their extensive reliance upon the rest of Article 5, § 8. D&M notes that section's specificity in allowing the Joint Committee to resolve knotty dilemmas of seniority, like this one, by modification or amendment. The plaintiff reasons that the power to amend, modify or add conditions to the Agreement is explicitly reserved only to the National or Area Committees' actions — not to an arbitration board. The plaintiff argues that what the arbitrators did was not to interpret subsection 4(c); rather they modified its meaning to allow coverage for "partial" cancellations.

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The board was presented with a challenge. It had to interpret the Agreement in the light of facts that were not explicitly covered under any of the Agreement's sections. There was also a relative dearth of prior Committee interpretation. In its April 1988 decision, the National Committee examined § 4(c)'s predecessor and determined that it was not totally applicable because Allied was not cancelled by Ford but was still used at KTP. The arbitrators recognized, however, the preference for seniority rights as expressed in Article 5, § 2. Like the National Committee, the majority reviewed the various sections of the Agreement and their possible interpretations. They determined that the closest relevant section was Article 5, § 4(c). While relying upon Article 5, § 8 as the basis for not having to choose specifically one of the varying interpretations for § 4(c), the arbitrators adopted their construction of § 8 in part because of the National Committee's own reliance upon that section to resolve the April 1988 dispute. It was to give effect to that prior decision, under even more compelling facts, that the majority "require[d] application" of § 8. The board therefore tailored its award as closely as possible to conform with the language of the Agreement and with prior interpretations of the body that was specifically authorized to modify or adapt the Agreement, the National Committee. A court may disagree with this interpretation, but it cannot dispute that this was but one of several rational interpretations. Accordingly, a court is not authorized to reject this plausible interpretation. *See, e.g., American Federation of Television & Radio Artists v. Storer Broadcasting Co.*, 745 F.2d 392, 398 (6th Cir. 1984).

Additionally, the fact remains that the very body specifically authorized to modify or amend the Agreement was irreparably deadlocked on the underlying grievance, thereby requiring arbitration under the terms of the collective bargaining agreement. Outside Article 9, § 7, no other portion of the Agreement specifies

the role and limits of arbitration. The board therefore determined that its opinions were within its authority to interpret and apply the Agreement. This action was also within the informed judgment of the arbitrators, and it was the remedy for which the parties had specifically bargained. *See Enterprise Wheel & Car,* 363 U.S. at 597 & 599. This resolution is a far cry from those cases in which the arbitrator either totally disregarded the plain language of the contract or administered a personal "brand of industrial justice." *Cf. Ficks Reed Co. v. Allied Indus. Workers of America,* __ F.2d __, No. 91-3777 (6th Cir. June 3, 1992) (arbitrator ignoring plain language of agreement); *Lourdes Hospital,* 958 F.2d at 157 (arbitrator essentially devising a new contractual term); *AP Parts,* 923 F.2d at 491 (arbitrator justifying findings solely in terms of his personal "sense of equity"); *Toshiba America,* 879 F.2d at 210 (arbitrator simply refusing to apply terms of agreement). *See also National Gypsum,* 793 F.2d at 766.

The arbitration award may indeed create economic disincentives. The plaintiff may well have sound economic reasons why it would prefer to use only its own employees, be they from KTP or outlying operations. It may be dissatisfied with the level of training or expertise of its former competitors' employees. It may also be that the parties simply prefer not to renegotiate the Agreement, from a desire to avoid dog-eat-dog conflicts between the various employers' workers, from general satisfaction with the bulk of the existing provisions, or out of mere avoidance of conflict. A court would be wrong, however, to strike down an arbitration award solely for these economic reasons. The answer to the economic disincentives, from this persepctive [sic], is simple: the parties should resolve these matters at the bargaining table, not in a court of law. Such concerns are appropriately left up to employers and unions and to their next round of collective bargaining for resolution.

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Accordingly, the judgment of the District Court is **AFFIRMED.**

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE ENTERED NOVEMBER 4, 1991

NO. C91-0099-L(M)

DALLAS & MAVIS FORWARDING CO., INC.,

Plaintiff

vs.

TRUCK DRIVERS LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants

JUDGMENT

The above matter having been referred to the United States magistrate judge, and the magistrate judge having filed his Findings of Fact, Conclusions of Law and Recommendations, and objections having been filed, and the Court having made a *de novo* determination of those portions of the magistrate judge's proposed Findings of Fact, Conclusions of Law and Recommendations to which objections have been made,

The Court accepts the Findings of Fact, Conclusions of Law and Recommendations of the magistrate judge, and

IT IS ORDERED AND ADJUDGED:

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1) Summary Judgment be, and it is, hereby GRANTED for defendants;

2) Plaintiff's motion for Summary Judgment be, and it is, hereby DENIED.

This is a final Judgment, and there is no just cause for delay.

Dated: 11/4/91

s/ Ronald E. Meredith
RONALD E. MEREDITH, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record
Chief U.S. magistrate judge

APPENDIX D — FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS FILED MAY 29, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. C91-0099-L(M)

DALLAS & MAVIS FORWARDING CO., INC.,
Plaintiff

vs.

TRUCK DRIVERS LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

FINDINGS OF FACT

1) This cause is before the undersigned pursuant to 28 U.S.C. Section 636(b)(1)(B) for Findings of Fact, Conclusions of Law and Recommendations.

2) The parties have filed cross motions for summary judgment and responses. (Docket Nos. 3, 5, 7, 9, 10). Accordingly, the issues are ripe for adjudication.

3) Plaintiff seeks to vacate an arbitration award pursuant to 29 U.S.C. Section 185, and 28 U.S.C. Section 1337 (Docket No. 1).

4) Defendant contends plaintiff violated the 1988 contract because of the manner in which plaintiff filled its yard and mounting jobs at the Kentucky Truck Plant ("KTP") of the Ford Motor Company ("Ford") in Louisville, Kentucky, beginning in March 1990. Ford opened the KTP in approximately 1969. Before and after that date, Ford operated its Louisville Assembly Plant ("LAP") in Louisville. Upon opening the KTP, Ford contracted with Dealers Transport, Inc. ("Dealers Transport") for all nonrail delivery of trucks manufactured at the KTP including yard releasing, baying of trucks, and mounting of trucks for driveaway delivery. Ford also contracted with Transport Services, Inc. ("TSI") to perform rail loading services for trucks manufactured at KTP destined for delivery by rail.

5) Charles L. Spond, Jr., Secretary-Treasurer of the defendant/Union, who has approximately twenty years of experience in servicing the car and truck hauling industries, testified before the Arbitration Board that Dealers Transport staffed its KTP operations first with its own employees, then with laid off employees from operations at the LAP, and then with employees laid off by other employers involved in vehicle delivery from the LAP.

6) Dealers Transport continued as the sole nonrail transporter of trucks manufactured at the KTP until it went into bankruptcy and ceased operations at the KTP in May 1980. Ford then awarded all work which Dealers Transport had performed at KTP to Motor Convoy, Inc. (During the time period in question, the interests of Motor Convoy, Inc. became those of Allied Systems. For simplicity, Motor Convoy will be the sole company referred to in these findings.) Spond testified without refutation that Motor Convoy took the seniority list of former employees of Dealers Transport and KTP intact.

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7) Ford's realignment of who would handle its traffic at the LAP and KTP led to a number of grievances and decisions by the National Automobile Transporters Joint Arbitration Committee ("National Arbitration Committee").

8) Spond testified as a result of what had happened with Dealers Transport, he, with the support of others in Louisville, developed proposals to amend Article 5 of the then effective National Agreement. Those efforts ultimately resulted in the provisions found in sections 4(c) and 5(a) of Article 5 of the 1988 National Agreement.

9) Motor Convoy continued as the sole nonrail transporter of trucks manufactured at KTP until approximately 1986 when plaintiff began truckaway delivery to the eleven western states and Canada. Trucks which plaintiff was then delivering would otherwise have been delivered by rail and, therefore, did not diminish the volume of work being performed by Motor Convoy. Decking and mounting of those trucks was performed by plaintiff's employees outside the KTP.

10) Around 1987, Ford changed the manner in which it invited bids for vehicle delivery from KTP and elsewhere. Rather than inviting bids on an all-or-nothing basis, Ford invited bids on the basis of delivery to various geographical areas. Ford also invited separate bids on a contractor's performing the Yard and mounting operations at the KTP.

11) In early 1988, Ford awarded plaintiff traffic from the KTP to the eleven western states, western Canada, and the upper Midwest states. Ford awarded the KTP yard and mounting operation and traffic to some other areas to Motor Convoy. At or about the same time, Ford ceased rail delivery from KTP. Ford's

elimination of rail delivery caused TSI to lay off its employees and increased the volume of mounting work being performed by Motor Convoy. To handle this increase, Motor Convoy offered yard jobs to some of its drivers.

12) Ford's 1988 realignment of carriers from the KTP resulted in a number of questions regarding the seniority rights of employees of Motor Convoy and TSI being put to the National Arbitration Committee. In October 1989, Ford again invited bids for yard and mounting work at the KTP and for delivering vehicles from that facility. Plaintiff submitted bids for the work and for delivery of vehicles to at least some areas. Plaintiff's bid was submitted contingent upon its receiving an award for driveaway traffic. In February 1990, Ford awarded to plaintiff the yard and mounting work which under the 1988 awards had been performed by Motor Convoy. Ford also awarded to plaintiff traffic to the eleven western states and western Canada which plaintiff had been servicing. Ford awarded to Motor Convoy traffic to eight Midwest states which had previously been serviced by plaintiff or Active Transportation, Inc. ("Active"), a nonunion carrier. Ford awarded traffic to three states to Active. Simultaneously with the implementation of those changes, Motor Convoy ceased lowboy, truckaway operations from KTP.

13) At the beginning of March 1990, Motor Convoy had approximately one hundred and twenty truckaway and driveaway drivers, ninety yard employees, and eight shop employees on its KTP seniority list. Because of its conversion from lowboy to driveaway and the loss of traffic to three states to Active, Motor Convoy did not anticipate a need for additional drivers to handle the traffic awarded it by Ford. Immediately before Ford's realignment of the KTP traffic became effective on March 5, 1990, Motor Convoy laid off all of its yard and shop employees. Motor Convoy subsequently offered work at locations distant from Louisville, Kentucky, to some of those employees.

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14) Plaintiff staffed the yard and mounting operations by offering those jobs to its own drivers domiciled at the KTP and to other of its employees laid off at different locations. Plaintiff also "floated" a number of employees domiciled elsewhere into and out of its KTP yard and mounting operations for some time and hired some employees from the street whom it considered to be "casuals."

15) Gordon Birdsall, Executive Vice-President of Jupiter Corporation Transportation Systems (plaintiff's owner), and Dan Sandy, Jr., advised the National Arbitration Committee in March 1990 that plaintiff had anticipated a need for approximately thirty-five additional deckers but thirty-five fewer drivers at the KTP. When asked during the arbitration hearing how plaintiff had contemplated accommodating the changes in business which it faced at the KTP, Birdsall replied in reviewing the previous two years at KTP, plaintiff had noted Motor Convoy afforded its employees transferability rights when additional help was needed in the decking shed; the National Arbitration Committee had denied the grievance by TSI's employees following Ford's 1988 realignment; for the last several years transferability had been applied "before anything else"; plaintiff anticipated losing thirty-five to forty drivers; and plaintiff felt instead of laying them off because of having lost the upper Midwest traffic, it should offer them transferability into the decking jobs. Furthermore, Motor Convoy could have the work which plaintiff's drivers had been performing in the upper Midwest. Birdsall testified many of the "floating" personnel were used to train plaintiff's employees to deck and mount efficiently; plaintiff used "casuals" to replace absentees; and such use of "casuals" was in accordance with plaintiff's practice.

16) Birdsall testified that on a number of occasions after March 1990, when the volume of yard and mounting work

increased, plaintiff, acting in accordance with Article 39, section 4, "Additional Help" of the Central/Southern-Eastern Areas Driveway Supplement, effective from June 1, 1988, through May 31, 1991 ("1988 Driveaway Supplement"), allowed employees laid off from its other Central/Southern facilities to come to the yard and mounting operation in the KTP. When the increase subsided, those individuals were laid off and, in accordance with seniority transferability, were allowed to bid into driving positions when such vacancies occurred.

17) The dispute at bar was heard by the National Arbitration Committee on March 7, 8, 22, and 23, 1990. During the meetings, the Committee deadlocked regarding the following motion:

> Based upon the facts presented, the displaced Allied Systems yard employees shall be entitled to exercise their full terminal seniority to fill all yard positions at Dallas & Mavis Forwarding Co., Inc.'s Louisville, Kentucky Truck Plant facility.

18) Defendant processed a grievance filed by Jack Bates on April 20, 1990, wherein he complained plaintiff had refused to allow him and others to bid into the shop. The grievance was heard by the Central/Southern-Eastern Areas Driveaway Joint Arbitration Committee ("Driveaway Arbitration Committee") on June 27-28, 1990. The Driveaway Arbitration Committee directed plaintiff "post bids under seniority transferability for the jobs presently being held by employees not in the decking shed by proper bid" and denied defendant's claim for monetary relief. Birdsall testified plaintiff subsequently found four people who were not in the shop by proper bid; plaintiff then bid four shop jobs; those jobs were filled by four drivers; and the four people who had been working in the shop "went out to driving."

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19) The applicable contract provisions between the two parties are as follows:

Article 3
Additional Employees

(c) When the Employer needs additional employees, it shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

The Local Union and the Employer agree to prepare a list of automobile transporter employees within their area who are currently on layoff status. The Employer agrees to give all persons on the list a good faith opportunity for employment before hiring new employees to perform work covered by this Agreement.

Separate lists shall be prepared for employees in separate classifications such as driver, yard, office and garage.

(d) No provision of this Article shall apply in any state to the extent that it may be prohibited by state law. If under applicable state law additional requirements must be met before any such provision may become effective, such additional requirements shall be met first.

Appendix D

Section 1.
Definitions of Terms

"Company seniority" is a term that is applied to an employee's date of hire by the Employer.

"Terminal seniority" is a term that is applied to the employee's most recent date of employment at a specific terminal.

"Dovetail seniority" is a term that is applied when two (2) or more seniority lists are merged or combined into a single list which recognizes the terminal seniority date of each employee. The list is arranged by terminal seniority date with the most senior employee at the top.

"Endtail seniority" is a term that is applied when an employee or group of employees are placed at the bottom of a terminal seniority list although they retain their company seniority date for fringe benefits.

"Terminal" is a term that is applied to any facility of an Employer to which employees are assigned to work whether called a branch, terminal, division or operation.

Section 2.

Terminal seniority rights for all employees covered by this Agreement shall prevail unless the Supplements or other provisions of this

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Agreement provide specifically to the contrary. Because of the nature of the transportation industry in which employees transfer during the term of their employment in the industry from one location to another as the flow of business requires, there are two (2) levels of seniority recognized by this Agreement. These levels are known as "company seniority" and "terminal seniority: as defined in Section 1.

The extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth, in writing, in this Agreement and in the Supplemental Agreements, including approved Local Riders.

Section 4.

Seniority lists are dovetailed in the following circumstances:

(a) When the same Employer merges two (2) or more terminals;

(b) When commonly owned separate Employers merge two (2) or more terminals;

(c) When two (2) or more Employers share traffic from the same shipper at the same location, excluding port facilities, and the traffic of one (1) of the Employers is cancelled

by the shipper and it is assigned to one (1) of the remaining Employers, whether or not there is a financial transaction of any kind involving the affected Employers; or,

(d) When two (2) or more terminals are merged after an Employer enters into a major financial transaction such as a merger, purchase, acquisition, sale or similar transaction with another Employer. It is immaterial whether the transaction involved merely the purchase of stock of one (1) corporation by another, with two (2) separate corporations continuing in existence.

(e) The above rules shall not apply to the acquisition of a wholly separate and independent company, the operations of which are conducted separately from other operations covered by this Agreement.

Section 5.

(a) In the event a shipper cancels its business relationship with an Employer at a location, excluding port facilities, and transfers all or part of that business to another Employer which is not servicing that shipper at that location, whether or not there is a financial transaction of any kind involving the affected Employers, both the active and laid-off employees of the cancelled Employer at that terminal and the laid-off employees of the

succeeding Employer who choose to accept employment opportunity at the affected location shall be placed in a master dovetailed seniority list in accordance with their company seniority. The succeeding Employer shall afford work opportunities to the employees on that master seniority list in order of their seniority.

(b) Employees of the cancelled Employer who remain laid off after all of the seniority rights contained in Sections 4 and 5(a) have been exercised shall remain on layoff status at their home terminal with recall rights unimpaired. They shall be afforded additional help opportunities at other locations by both Employers in accordance with the applicable Supplemental Agreement. The succeeding Employer must exhaust its obligations to its existing laid-off employees before offering opportunities to employees of the cancelled Employer.

Section 8.

The parties acknowledge that the above rules are intended solely as general standards and further agree that many factual situations may be presented to the Committee which necessitate modification or amendment in the application of these rules to specific factual cases and as set forth in the definition contained in Section 1. Accordingly, the Employers and the Union acknowledge that

questions involving the accrual, interpretation or application of seniority rights may arise which require different treatment. It is understood that the Employers, the Union and the National or Area Joint Arbitration Committees may mutually agree to such disposition of questions of seniority which, in their judgment, is appropriate under the circumstances. The National and Area Joint Arbitration Committees shall have the authority to determine the establishment and application of seniority in all situations presented to them and the seniority decisions of the Joint Arbitration Committees shall be final and binding on the Employer, the Union and the employees.

Article 7
Grievance Machinery

Section 9.
Board of Arbitration

(a) If any grievance or dispute is deadlocked by the National Joint Arbitration Committee as provided above, the Committee shall submit the grievance to a Board of Arbitration consisting of three (3) members:

(1) One (1) member to be appointed by the Union co-chairperson;

(2) One (1) member, by the Employer chairperson; and,

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(3) The two (2) together appointing a third (3rd) disinterested arbitrator.

(b) It is agreed that the arbitrator is empowered to hear and decide the deadlocked case, even if only one (1) of the parties submits to arbitration, or if either party fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to interpret and apply the provisions of this Agreement or Supplements thereto, where appropriate, but shall not have the authority to amend or modify this Agreement or Supplements thereto, or establish new terms and conditions under this Agreement or Supplements thereto.

(c) All grievances submitted to the Board of Arbitration must be heard and disposed of within thirty (30) days. The findings and decision of a majority of the Arbitration Board shall be final and binding on the parties and the employees involved.

(d) The cost of the arbitrator shall be shared equally by both the Local Union and the Employer involved.

Article 26.
Nondiscrimination

The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such

individual's age, race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of age, race, color, religion, sex or national origin.

Nothing herein (in seniority or other provisions contained in this National Master Agreement or any approved Area Supplement) shall be construed or applied to deny to any employee the employment opportunities set forth above.

Any alleged denial of the aforesaid opportunities in violation of this Article shall be submitted to the grievance procedure.

In those terminals where classification seniority applies, the parties agree that in filling vacancies with qualified employees which occur subsequent to the execution of this Agreement, the principle of carryover terminal seniority shall be recognized. In the event that the Employer and the Local Union fail to formulate a Rider which provides for the filling of vacancies consistent with the foregoing provision, the Joint Area Committees shall have such authority.

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Article 39
Seniority

Section 4.
Additional Help

(a) Where additional help is needed by any Employer at a terminal, over and above that provided for in Section 7(a) of Article 5 of the National Master Automobile Transporters Agreement, said additional or supplemental work shall be offered to the oldest laidoff employees of the Employer involved, on a voluntary basis. Those employees accepting said supplemental work at another terminal on a voluntary basis shall go to the bottom of the terminal seniority board and hold Company seniority there only for fringe benefit purposes. However, when work picks up at the employee's regular terminal, he will be given an opportunity to go back to his regular terminal and, if he elects to remain at the new terminal, then he no longer will hold his terminal seniority position at the old terminal but will remain at the new terminal with terminal seniority as of the date he transferred into the same and his layoff at said new terminal would be in accordance with his terminal seniority.

(b) Laid-off employees transferred under (a) above must remain at the new terminal until such time as they are laid off or called back to their old terminal. An employee will remain on

the terminal seniority list at any terminal into which the employee has transferred under this Section until the employee refuses recall to that particular terminal or otherwise loses seniority under any Article of this Agreement.

(c) It will not be necessary for the Employer to transfer an employee or for a laid-off employee to return to the former terminal under Section 4(a) above, if the work available is for less than thirty (30) days.

(d) Laid-off employees to qualify for transfer as called for above must designate to the Employer, in writing, their willingness to accept a work assignment at another company terminal and/or branch in their regular classification or in another classification in which they are qualified by experience with the Employer to perform the work. The Employer will supply a form at the time of layoff.

(e) Employees seeking to transfer to other facilities must designate, in writing, at time of layoff which facilities they will or will not transfer to at the time of layoff. Employees will be offered a particular location only one (1) time during their layoff period.

(f) Additional help provisions of this Section do not transcend the Central-Southern Conference Areas or the Eastern Conference Area.

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Docket No. 5, Plaintiff's Exhibit No. 5.

20) Because the National Joint Arbitration Committee became deadlocked, pursuant to Article 7, section 9, a Board of Arbitration was created. The Board issued a detailed and lengthy opinion on December 14, 1990 (Docket No. 5, Plaintiff's Exhibit No. 2). The Board issued the following Award:

> Having heard or read and carefully considered the evidence and arguments in the present case a majority of the Board of Arbitration finds that at the commencement of its yard and mounting operations at the KTP on March 5, 1990, Dallas & Mavis was required by article 5, subsection 4(c) and section 8 of the 1988 National Agreement to merge its KTP seniority list with that of employees laid off by Allied Systems from yard and mounting jobs at the KTP and to offer jobs in its yard and mounting operations at the KTP to employees on that merged seniority list in accordance with their respective seniorities. The Board further finds that because Dallas & Mavis did not effect such a merged seniority list and did not offer jobs in its yard and mounting operations at the KTP in accordance with such a list, Dallas & Mavis violated the provisions of the 1988 National Agreement cited in the immediately preceding sentence. To remedy this violation the Board of Arbitration directs Dallas & Mavis (1) to prepare a merged seniority list of its KTP employees and of employees laid off by Allied Systems from

yard and mounting jobs at the KTP on the basis of KTP terminal seniorities as of March 5, 1990, (2) to offer jobs in its "third party"/yard and mounting operations at the KTP to employees on that list in seniority order, (3) and to make whole all former Allied Systems' employees who accept such job offers for the time they were unemployed from March 5, 1990, until their employment by Dallas & Mavis in accordance with this Award. From any back pay due any employee because of this Award, Dallas & Mavis may withhold an amount equal to the total of sums paid any such employee for unemployment compensation as a result of having been unemployed from March 5, 1990, until that employee was employed by Dallas & Mavis in accordance with this Award and sums earned by any such employee during that said period of time.

The Board of Arbitration will retain jurisdiction of the present grievance until March 14, 1991, to resolve disputes regarding the remedy directed herein, if any. If the Chairperson of the Board is notified by telephonic or other means of the existence of any such dispute on or before 4:30 p.m., Central Time, on March 14, 1991, the jurisdiction of the Board shall be extended for as long as is necessary to resolve disputes regarding the remedy directed. If, on the other hand, the Chairperson is not notified of any dispute by 4:30 p.m., Central Time, on March 14, 1991, the jurisdiction of this Board of Arbitration shall then cease.

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Docket No. 5, Plaintiff's Exhibit No. 2.

CONCLUSIONS OF LAW

The undersigned, having made Findings of Fact, makes the following Conclusions of Law:

1) Plaintiff argues insofar as the Board of Arbitration ruled plaintiff violated Article 5 of the contract, the Arbitration Award fails to derive its essence from the Agreement because: (1) the Award conflicts with the express terms of the contract; (2) the Award imposes additional requirements not expressly provided in the Agreement and improperly amends or modifies the Agreement; (3) the Award ignores the collective bargaining history; (4) the Award is without rationale [sic] support and cannot be rationally derived from the terms of the Agreement; (5) the Award is based on general considerations of fairness and equity instead of the precise terms in the Agreement; and (6) the Award is punitive rather than compensatory (Docket No. 1 at 9). As a result, plaintiff requests the Award be vacated and the matter remanded to the Board of Arbitration to take action not inconsistent with the Court's Order.

2) Article 5, section 8, of the contract specifically provides there are many factual situations which may be presented that would necessitate modification or amendment in the application of the rules set forth in section 1. The parties acknowledged questions involving accrual, interpretation, and application of seniority rights may arise which require different treatment. The National and Area Joint Arbitration Committees are given the authority to determine the establishment and application of seniority in all situations presented to them. The decisions of seniority is to be binding upon the parties. Furthermore, Article 7, section 9, provides the Board of Arbitration which was created in this case has the authority to

interpret and apply the provisions of the Agreements or the supplements thereto. The Board does not have the authority to amend or modify the Agreements or supplements thereto or establish new terms and conditions thereunder.

3) In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court stated:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. when the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
>
> * * *
>
> [I]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's

> decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id., at 597, 599.

4) In *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), the Court stated:

> [T]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which

> those who are not a part of the plant environment may be quite unaware.

Id., at 567-568.

5) In *United Paperworkers Int'l. Union v. Misco. Inc.*, 484 U.S. 29 (1987), the Court stated:

> Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate. *Id.*, at 597.

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"The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-568 (1960) (emphasis added; footnote omitted).

See also *AT&T Technologies. Inc. v. Communications Workers*, 475 U.S. 643, 649-650 (1986).

* * *

[B]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's

view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. *Enterprise Wheel, supra,* at 599. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a

> labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers, supra, at 36-37, 38.

6) In *Cement Divisions National Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC Local 135*, 793 F.2d 759, 766 (6th Cir. 1986), the Court stated an arbitration award fails to derive its essence from an agreement when it: (1) conflicts with the express terms of the agreement; (2) imposes additional requirements that are not expressly provided in the agreement; (3) lacks rational support or cannot be rationally derived from the terms of the agreement; and (4) is based on general considerations of fairness and equity rather than the precise terms of the agreement. So long as the arbitrator's award draws its essence from the agreement, the parties are bound by its decision. *Id.*

7) In examining the Board's decision, the undersigned concludes the Arbitration Board acted within its authority by reasonably construing the terms of the contract in order to fashion an award which draws its essence from the agreement. It is inescapable that the Arbitration Board based its decision upon its reading of the contract. The Board looked at the agreement to see how the positions of the two parties fit into the language of the agreement. In reviewing the entire agreement and the well written opinion of the Arbitration Board, the undersigned finds the Board's reading of the contract is permissible and supported by the facts. Accordingly, pursuant to *Paperworks, supra; American Mfg.*,

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supra; Enterprise Wheel, supra; and *Cement Divisions. National Gypsum Co. (Huron), supra*, the undersigned will recommend the Arbitration Board's decision be upheld. Accordingly, the undersigned will recommend summary judgment be granted for defendants, and plaintiff's motion for summary judgment be denied.

RECOMMENDATIONS

The undersigned, having made Findings of Fact and Conclusions of Law, makes the following Recommendation:

1) Summary Judgment be granted for defendants;

2) Plaintiff's motion for Summary Judgment be denied.

Dated: May 28, 1991

s/ George J. Long
GEORGE J. LONG
Chief U.S. magistrate judge

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NOTICE

Therefore, under the provisions of 28 U.S.C. Section 636(b)(1)(B)(c), the magistrate judge files these proposed Findings and Recommendations with the Court and a copy shall forthwith be mailed to all parties. Within ten (10) days after being served a copy, any party may serve and file written objections to such proposed Findings and Recommendations as provided by the Court. If a party has objections, such objections must be filed within ten (10) days or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd.*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Counsel will please forward a copy of any objections to the undersigned at Room 200, Gene Snyder U.S. Courthouse Building, Sixth and Broadway, Louisville, Kentucky 40202.

Dated: May 28 1991

s/ George J. Long
GEORGE J. LONG
Chief U.S. magistrate judge

Copies to:
Counsel of Record
Chief U.S. magistrate judge

APPENDIX E — OPINION AND AWARD OF THE BOARD OF ARBITRATION DATED DECEMBER 14, 1990

GRIEVANCE NO: 3-90-237

GRIEVANCE: Seniority Rights at Kentucky Truck Plant

CHAIRPERSON'S FILE: 1990-1315

IN THE MATTER OF THE ARBITRATION BETWEEN

DALLAS & MAVIS FORWARDING COMPANY, INC. AND ALLIED SYSTEMS, INC.

AND

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89

OPINION AND AWARD

BOARD OF ARBITRATION:
CHAIRPERSON: Jack Clarke
APPOINTED ARBITRATOR: Charles J. Piscitello
MANAGEMENT APPOINTED ARBITRATOR: Eugene J. Sobie
AWARD DATE: 14 December 1990

APPEARANCES FOR THE PARTIES

UNION

Alton D. Priddy, Esq., Hardy, Logan, Priddy & Cotton, Louisville, KY

Jonathan C. Hardy, Esq., Hardy, Logan, Priddy & Cotton, Louisville, KY

Charles L. Spond, Jr., Secretary-Treasurer, Teamsters Local Union No. 89

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DALLAS & MAVIS

C. John Holmquist, Jr., Esq., Charfoos, Reiter, Peterson & Holmquist, P.C., Birmingham, MI

Gordon V. Birdsall, Executive Vice-President, Jupiter Corporation Transportation Services

ALLIED SYSTEMS

Alexander E. Wilson, III, Esq., Alston & Bird, Atlanta, GA

Curtis Goodwin, Vice-President for Labor Relations, Allied Systems, Ltd.

PROCEDURAL HISTORY

Dallas & Mavis Forwarding Company, Inc. is herein referred to as "Dallas & Mavis". Allied Systems, Inc. is herein referred to as "Allied Systems". General Drivers, Warehcusemen & Helpers, Local Union No. 89 is herein referred to as "Union".

The present case was formally initiated by Allied Systems and Dallas & Mavis. The dispute was processed in accordance with article 7 "Grievance Machinery" of the National Master Automobile Transporters Agreement effective from June 1, 1988 through May 31, 1991 (hereinafter "1988 National Agreement"). The National Joint Arbitration Committee referred to in section 7 of article 7 deadlocked regarding the case in a meeting held on March 22 and 23, 1990. The dispute was thereafter referred to a Board of Arbitration established in accordance with section 9 of article 7. Jack Clarke was selected to Chair that Board. Charles J. Piscitello served as the member appointed by the "Union" as identified in article 1, section 2 of the 1988 National Agreement, and Eugene J. Sobie served as the member appointed by the "Employer" as identified in section 1 of article 1.

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An arbitration hearing was held at the Executive West Hotel, Louisville, Kentucky on September 24, 1990. During the course of the hearing, all parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.

A stenographic record and transcript of the arbitration hearing were prepared by or under the direction of Patricia J. Schneider, RPR. The Chairperson received the transcript on October 5, 1990.

The parties elected to file post hearing briefs. The Chairperson received timely submitted briefs. The Chairperson received the last brief on November 14, 1990.

The parties stipulated that the grievance and arbitration were timely and properly before the Board of Arbitration.

The parties agreed that the Board of Arbitration might frame the issues to be resolved in the present case after considering the evidence and arguments presented.

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PERTINENT PROVISIONS OF THE NATIONAL MASTER AUTOMOBILE TRANSPORTERS AGREEMENT EFFECTIVE FROM JUNE 1, 1988 THROUGH MAY 31, 1991

. . . .

ARTICLE 3.
RECOGNITION, UNION SHOP AND CHECKOFF

Section 1.

. . . .

Additional Employees

(c) When the Employer needs additional employees, it shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

. . . .

ARTICLE 5.
SENIORITY

Section 1.

Definition of Terms

"Company seniority" is a term that is applied to an employee's date of hire by the Employer.

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"Terminal seniority" is a term that is applied to the employee's most recent date of employment at a specific terminal.

"Dovetail seniority" is a term that is applied when two (2) or more seniority lists are merged or combined into a single seniority list which recognizes the terminal seniority date of each employee. The list is arranged by terminal seniority date with the most senior employee at the top.

"Endtail seniority" is a term that is applied when an employee or group of employees are placed at the bottom of a terminal seniority list although they retain their company seniority date for fringe benefits.

"Terminal" is a term that is applied to any facility of an Employer to which employees are assigned to work whether called a branch, terminal, division or operation.

Section 2.

Terminal seniority rights for all employees covered by this Agreement shall prevail unless the Supplements or other provisions of this Agreement provide specifically to the contrary. Because of the nature of the transportation industry in which employees transfer during the term of their employment in the industry from one location to another as the flow of business requires, there are two (2) levels of seniority recognized by this Agreement. These levels are known as "company seniority" and "terminal seniority" as defined in Section 1.

The extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth, in writing, in this Agreement and in the Supplemental Agreements, including approved Local Riders.

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. . . .

Section 4.

Seniority lists are dovetailed in the following circumstances:

. . . .

(c) When two (2) or more Employers share traffic from the same shipper at the same location,, [sic] excluding port facilities, and the traffic of one (1) of the Employers is cancelled by the shipper and it is assigned to one (1) of the remaining Employers, whether or not there is a financial transaction of any kind involving the affected Employers; or,

. . . .

(e) The above rules shall not apply to the acquisition of a wholly separate and independent company, the operations of which are conducted separately from other operations covered by this Agreement.

Section 5.

(a) In the event a shipper cancels its business relationship with an Employer at a location, excluding port facilities, and transfers all or part of that business to another Employer which is not servicing that shipper at that location, whether or not there is a financial transaction of any kind involving the affected Employers, both the active and laid-off employees of the cancelled Employer at that terminal and the laid off employees of the succeeding Employer who choose to accept employment opportunity at the affected location shall be placed in a master dovetailed seniority

list in accordance with their company seniority. The succeeding Employer shall afford work opportunities to the employees on that master seniority list in order of their seniority.

(b) Employees of the cancelled Employer who remain laid off after all of the seniority rights contained in section 4 and 5(a) have been exercised shall remain on layoff status at their home terminal with recall rights unimpaired. They shall be afforded additional help opportunities at other locations by both Employers in accordance with the applicable supplemental Agreement. The succeeding Employer must exhaust its obligations to its existing laid-off employees before offering opportunities to employees of the cancelled Employer.

Section 6.

Sections 1 through 5 restate, in part, the Agreement and practices developed under Article 5, Section 1 of the 1985-1988 contract and previous contracts. This restatement is not to be construed as changing retroactively the established seniority lists or other terms and conditions of employment in existing terminals.

. . . .

Section 8. The parties acknowledge that the above rules are intended solely as general standards and further agree that many factual situations may be presented to the Committee which necessitate modification or amendment in the application of these rules to specific factual cases and as set forth in the definition contained in Section 1. Accordingly, the Employers and the Union acknowledge that questions involving the accrual, interpretation or application of seniority rights may arise which require different treatment. It is understood that the Employers, the Union and the

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National or Area Joint Arbitration Committees may mutually agree to such disposition of questions of seniority which, in their judgment, is appropriate under the circumstances. The National and Area Joint Arbitration Committees shall have the authority to determine the establishment and application of seniority in all situations presented to them and the seniority decisions of the Joint Arbitration Committees shall be final and binding on the Employer, the Union and the employees.

. . . .

ARTICLE 7.
GRIEVANCE MACHINERY

. . . .

Section 9.

. . . .

(b) It is agreed that the arbitrator is empowered to hear and decide the deadlocked case, even if only one (1) of the parties submits to arbitration, or if either party fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to interpret and apply the provisions of this Agreement or Supplements thereto, where appropriate, but shall not have the authority to amend or modify this Agreement or Supplements thereto, or establish new terms and conditions under this Agreement or Supplements thereto.

. . . .

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ARTICLE 26.
NONDISCRIMINATION

. . . .

In those terminals where classification seniority applies, the parties agree that in filling vacancies with qualified employees which occur subsequent to the execution of this Agreement, the principle of carry-over terminal seniority shall be recognized. In the event that the Employer and the Local Union fail to formulate a Rider which provides for the filling of vacancies consistent with the foregoing provision, the Joint Area Committees shall have such authority.

. . . .

PERTINENT PROVISIONS OF THE
CENTRAL/SOUTHERN-EASTERN CONFERENCE AREAS
DRIVEAWAY SUPPLEMENT FOR THE PERIOD OF
JUNE 1, 1988 THROUGH MAY 31, 1991

. . . .

ARTICLE 39.
SENIORITY

. . . .

Section 4.

Additional Help

(a) Where additional help is needed by any Employer at a terminal, over and above that provided for in Section 7(a) of Article

5 of the National Master Automobile Transporters Agreement, said additional or supplemental work shall be offered to the oldest laid-off employees of the Employer involved, on a voluntary basis. Those employees accepting said supplemental work at another terminal on a voluntary basis shall go to the bottom of the terminal seniority board and hold company seniority there only for fringe benefit purposes. However, when work picks up at the employee's regular terminal, he will be given an opportunity to go back to his regular terminal and, if he elects to remain at the new terminal, then he no longer will hold his terminal seniority position at the old terminal but will remain at the new terminal with terminal seniority as of the date he transferred into the same and his layoff at said new terminal would be in accordance with his terminal seniority.

BACKGROUND

Set forth in this Background are undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and additional evidence will be referred to in the Discussion hereinafter to the extent necessary to resolution of the present dispute.

In the present case the Union objects that Dallas & Mavis violated the 1988 National Agreement in the manner in which it filled yard and mounting jobs at the Kentucky Truck Plant (hereinafter "KTP") of the Ford Motor Company (hereinafter "Ford") in Louisville, Kentucky beginning in March 1990. Ford opened the KTP in approximately 1969. Before and after that date Ford operated its Louisville Assembly Plant (hereinafter "LAP") in Louisville. Upon opening the KTP Ford contracted with Dealers Transport, Inc. (hereinafter "Dealers Transport") for all non-rail delivery of trucks manufactured at the KTP including yard releasing and baying of trucks and mounting of trucks for

driveaway delivery. Ford also contracted with Transport Services, Inc. (hereinafter "TSI") to perform rail loading services for trucks manufactured at KTP destined for delivery by rail. Charles L. Spond, Jr., Secretary-Treasurer of the Union who has approximately 20 years of experience in servicing the car and truck hauling industries on behalf of the Union, testified that Dealers Transport staffed its KTP operations first with its own employees then laid off from operations at the LAP and then with persons laid off by other employers involved in vehicle delivery from the LAP.

Dealers Transport continued as the sole non-rail transporter of trucks manufactured at the KTP untll it went into bankruptcy and ceased operations at the KTP in May 1980. Ford then awarded all work which Dealers Transport had performed at KTP to Motor Convoy, Inc.[1] Spond testified without refutation that Motor Convoy took the seniority list of former Dealers Transport KTP employees intact.

Ford's realignment of who would handle its traffic at the LAP and KTP led to a number of grievances appealed to and decisions by the National Automobile Transporters Joint Arbitration Committee (hereinafter "National Arbitration Committee"). Copies of decisions by the Committee regarding the 1980 realignment of carriers for Ford from Louisville were introduced as Joint Exs. #s 4A (June 4, 1980), 4B (April 7-9, 1981), and 4C (April 19-22, 1982).

Spond testified that as a result of what had happened with

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1. At some point in time the interests of the entity known as Motor Convoy, Inc. became those of Allied Systems. Various witnesses used "Motor Convoy" and "Allied Systems" interchangably. Because identification of one or another of the two entities is irrelevant to resolution of the present case, the Board may also use "Motor Convoy" and "Allied Systems" interchangably.

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Dealers Transport, he, with the support of others in Louisville, developed proposals to amend article 5 of the then effective National Agreement and that those efforts ultimately resulted in the provisions found in sections 4(c) and 5(a) of article 5 of the 1988 National Agreement that those sections apply whether or not there is a financial transaction of any kind between employers.

Motor Convoy continued as the sole non-rail transporter of trucks manufactured at KTP until approximately 1986 when Dallas & Mavis began truckaway delivery to the 11 western states and Canada. Trucks which Dallas & Mavis was then delivering would otherwise have been delivered by rail and therefore did not diminish the volume of work being performed by Motor Convoy. Decking and mounting of those trucks was performed by Dallas & Mavis employees outside the KTP.

In approximately 1987 Ford changed the manner in which it invited bids for vehicle delivery from the KTP (and elsewhere). Rather than inviting bids on an all-or-nothing basis, Ford invited bids on the basis of delivery to various geographical areas. Ford also invited separate bids on a contractor's performing the yard and mounting operations, commonly referred to as "third party" work, at the KTP.

In early 1988 Ford awarded Dallas & Mavis traffic from the KTP to the 11 western states, western Canada, and the upper midwest states. Ford awarded the KTP yard and mounting operation and traffic to some other areas to Motor Convoy. At or about the same time Ford ceased rail delivery from KTP. Ford's elimination of rail delivery caused TSI to lay off its employees and increased the volume of mounting work being performed by Motor Convoy. To handle this increase Motor Convoy offered Yard jobs to some of its Drivers.

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Ford's 1988 realignment of carriers from the KTP resulted in a number of questions regarding the seniority rights of Motor Convoy's and TSI's employees being put to the National Arbitration committee. Decisions by the Committee regarding at least some of those questions were introduced into evidence as Joint Exs. #s 5A (April 11-14, 1983), 5B (October 17-19, 1988), and 5C (February 7-9, 1989).

In October 1989 Ford again invited bids for yard and mounting work at the KTP and for delivering vehicles from that facility. Dallas & Mavis submitted bids for the third party work and for delivery of vehicles to at least some areas. Dallas & Mavis' third party bid was submitted contingent upon its receiving an award for driveaway traffic. In February 1990 Ford awarded to Dallas & Mavis the yard and mounting work which under the 1988 awards had been performed by Motor Convoy/Allied Systems. Ford also awarded to Dallas & Mavis traffic to the 11 western states and western Canada which Dallas & Mavis had been servicing. Ford awarded to Motor Convoy/Allied Systems traffic to eight midwest states which had previously been serviced by Dallas & Mavis or Active Transportation, Inc. (hereinafter "Active"), a non-union carrier. Ford awarded traffic to three states to Active. Simultaneously with the implementation of those changes Allied Systems ceased lowboy, truckaway operations from KTP.

At the beginning of March 1990 Allied Systems had approximately 120 truckaway and driveaway Drivers, 90 Yard employees and 8 Shop employees on its KTP seniority list. Because of its conversion from lowboy to driveaway and the loss of traffic to three states to Active, Allied Systems did not anticipate a need for additional Drivers to handle the traffic awarded it by Ford. Immediately before Ford's realignment of the KTP traffic became effective on March 5, 1990 Allied Systems laid off all of its

Yard and Shop employees. Allied Systems subsequently offered work at locations distant from Louisville, Kentucky to some of those employees.

Dallas & Mavis staffed the yard and mounting operations by offering those jobs to its own Drivers domiciled at the KTP and to other of its employees laid off at different locations. Dallas & Mavis also "floated" a number of employees domiciled elsewhere than Louisville, Kentucky into and out of its KTP yard and mounting operation for some time and hired some employees from the street whom it considered to be "casuals". Gordon Birdsall, Executive Vice-President of Jupiter Corporation Transportation Systems (the owner of Dallas & Mavis) and/or Dan Sandy, Jr. advised the National Arbitration Committee on March 7 or 8, 1990 that Dallas & Mavis had anticipated a need for approximately 35 additional Deckers but 35 fewer Drivers at the KTP. When asked during the present arbitration hearing how Dallas & Mavis had contemplated accommodating the changes in business which it faced at the KTP in March 1990 Birdsall replied that in reviewing the previous two years at KTP Dallas & Mavis had noted that Motor Convoy had afforded its employees transferability rights when additional help was needed in the decking shed, that the National Arbitration Committee had denied the grievance by TSI's employees following Ford's 1988 realignment, and that for the last several years transferability had been applied "before anything else"; that Dallas & Mavis anticipated losing 35 to 40 Drivers; and that Dallas & Mavis felt that instead of laying them off because of having lost the upper midwest traffic, it should offer them transferability into the Decking jobs and that Allied Systems' Drivers could have the work which Dallas & Mavis' Drivers had been performing in the upper midwest. Birdsall testified that many of the "floating" personnel were used to train Dallas & Mavis' employees to deck and mount efficiently; that Dallas & Mavis used casuals to replace absentees; and that such use of casuals was in accordance with Dallas & Mavis' practice.

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Birdsall testified that on a number of occasions after March 1990 when the volume of yard and mounting work increased, Dallas & Mavis, acting in accordance with article 39, section 4 "Additional Help"- of the Central/SouthernEastern Areas Driveaway Supplement effective from June 1, 1988 through May 31, 1991 (hereinafter "1988 Driveaway Supplement"), allowed employees laid off from other of its Central/Southern facilities to come to the yard and mounting operation in the KTP and that when that increase subsided, those individuals were laid off and in accordance with seniority transferability allowed to bid into driving positions when such vacancies occurred.

The present case was heard by the National Arbitration Committee on March 7 and 8 and again on March 22 and 23, 1990. During the latter meeting the Committee deadlocked regarding the following motion:

> Based upon the facts presented, the displaced Allied Systems yard employees shall be entitled to exercise their full terminal seniority to fill all yard positions at Dallas & Mavis Forwarding Co., Inc.'s Louisville, Kentucky Truck Plant facility.

The Union processed a grievance filed by Jack Bates on April 20, 1990 wherein he complained that Dallas & Mavis had refused to allow him and others to bid into the Shop. The grievance was heard by the Central/Southern-Eastern Area Driveaway Joint Arbitration Committee (hereinafter "Driveaway Arbitration Committee") on June 27-28, 1990. The Committee directed Dallas & Mavis "post bids under seniority transferability for the jobs presently being held by employees not in the decking shed by proper bid" and denied the Union's claim for monetary relief.

Birdsall testified that Dallas & Mavis subsequently found four people who were not in the shop by proper bid; that Dallas & Mavis then bid four shop jobs; that those jobs were filled by four Drivers; and that the four people who had been working in the shop "went out to driving".

POSITIONS OF THE PARTIES

UNION

The Union contends that the issues to be resolved in the present arbitration are:

> 1. Did the failure by Dallas & Mavis to hire or offer work to laid off employees of Allied Systems in the yard and mounting classifications at the KTP violate the parties' Collective Bargaining Agreements?
>
> 2. If so, what is the remedy?

The Union contends that Dallas & Mavis did so violate the parties' collective bargaining agreements including the 1988 National Agreement.

The Union contends that article 5 of the 1988 National Agreement required Dallas & Mavis to allow laid off Yard and Mounting employees at the KTP to "follow their work". The Union contends that in accordance with section 2 of article 5 terminal seniority prevails unless a contractual supplement or other provision of the 1988 National Agreement specifically provides otherwise; that based on the facts of the present case section 4(c) of article 5 required that Dallas & Mavis "dovetail" the seniority list of affected Allied Systems' employees with that of Dallas &

Mavis' employees at the KTP; and that Allied Systems' employees, having greater terminal seniority at the KTP, were entitled to be elevated to the top of a merged seniority list. Alternatively the Union contends that section 5(a) of article 5 required that Dallas & Mavis dovetail its seniority list with that of affected Allied Systems' employees.

The Union contends that the purpose and intent of article 5 is that employees identified to work at a particular location be allowed to follow that work. The Union contends that section 2 of article 5 "recognizes the peculiar nature of the industry and the instability in the 'flow of business' "; that section 8 of article 5 recognizes that the facts of a specific case may warrant special treatment, that the seniority provisions outlined are to serve as guidelines, and that "it is incumbent upon the Board of Arbitration to consider the overall purpose and intent of the seniority provisions and the historical application of the Agreement to allow employees to follow their work"; that application of the follow-the-work principle was recognized and approved by the Supreme Court [2]; and that the history at the KTP as well as numerous panel decisions specifically including the National Arbitration Committee's decisions which grew out of Ford's 1980 and 1988 reallocations of traffic from the KTP show that article 5 has been consistently applied to protect the jobs of employees seeking to follow their work. The Union contends that the National Committee's decision regarding TSI's employees is distinguishable in that the Committee apparently deemed rail loading a completely different mode of operation no longer used at the KTP. The Union further contends that the Committee's decision regarding TSI's employees should be viewed as an aberration.

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2. Humphrey v. Moore, 375 U.S. 335 (1964).

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Alternatively to its article 5 arguments, the Union contends that Dallas & Mavis was at a minimum required to offer the work in question to Allied Systems' laid off employees under article 3 of the 1988 National Agreement. The Union contends that the evidence in the present case makes it "crystal clear" that Dallas & Mavis circumvented the Union and in bad faith denied Allied Systems' employees any opportunity to follow their work and that allowing Dallas & Mavis to ignore experienced workers and bring in new hires and casuals would render section 1(c) of article 3 "completely meaningless".

The Union contends that article 26 of the 1988 National Agreement has no application to the present dispute. The Union contends that the language of article 26 shows that it pertains to situations in which an employee seeks to transfer to another classification with the same employer at the same terminal; that it says nothing about dovetail situations; and that the history of article 26 as testified to by Spond makes clear that it has no application.

The Union requests the Board of Arbitration find that article 5 of the 1988 National Agreement applies to the present dispute and requires that former Allied Systems' employees in the Yard and Mounting classifications at KTP be allowed to follow their work and direct Dallas & Mavis (1) to dovetail its seniority list with that of affected Allied Systems' employees under either section 4(c) or 5(a) of article 5 and (2) to give affected Allied Systems' employees an option to return to the yard and (3) to pay backpay to former Allied Systems' employees on layoff status because of Dallas & Mavis' refusal to allow them in follow their work.

DALLAS & MAVIS

Dallas & Mavis contends that it did not violate article 5 of the

1988 National Agreement. Dallas & Mavis contends that arbitrators have used five basic approaches to competitive seniority disputes[3]; that one such approach is "follow the work"; that the Union's argument that that approach is embodied in article 5 of the 1988 National Agreement "is simply not supported by the language" of that article; that contrary to the Union's position there was no change to the language of article 5 from the 1985 National Agreement to the 1988 National Agreement to reflect a situation which occurred in Louisville addressed by the National Arbitration Committee in its April 1988 decision; that application of the Committee's rationale in that decision to the facts of the present case shows that article 5, section 4(c) is not applicable because the traffic of one employer was not cancelled by Ford and assigned to the remaining employer and that section 5(a) does not apply because Ford neither cancelled its business relationship with Dallas & Mavis nor Allied Systems at the KTP and did not transfer all or part of its business to another employer which was not servicing Ford at that facility. Dallas & Mavis contends that as experience with the 1988 bid awards demonstrated, it is clear that the effects of changes made by Ford in 1990 balance out and that any adverse impact arising from the 1990 bid awards regarding Allied Systems' employees was, as recognized by the Union, the result of Allied Systems' over bidding of the Yard classification. Dallas & Mavis contends that the absence of any change to sections 4 and 5(a) of article 5 subsequent to the National Arbitration Committee's decision in April 1988 supports Dallas & Mavis' position that those provisions do not apply to the present case.

Dallas & Mavis contends that the Union failed to satisfy its

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3. *See. e.g.*, Purity Baking Co., 95 LA 172 (1990) (Gordon, Arb.); Nassau-Suffolk County Seniority Roster of Local 640, IATSE (1969) (Spelfogel, Arb.), *see also* Kennedy, *Merging Seniority Lists* in Labor Arbitration and Industrial Change, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators 1 (1963).

burden of proving that Dallas & Mavis was obligated to allow a follow the work application of seniority under article 5[4]; that the Union failed to establish the existence of a binding past practice which would somehow obligate Dallas & Mavis to apply a follow the work principle[5]; and that a number of decisions of the National Arbitration Committee support Dallas & Mavis' position in the present case.

Dallas & Mavis contends that its position more closely follows principles of contract construction than does that of the Union; that to determine the intent of parties, an arbitrator or board of arbitration should not focus on a single word or phrase but rather determine intent based upon the contract as a whole[6]; and that any ambiguity not clarified by any other rule of interpretation may be removed by construing the ambiguous language against the party that proposed it[7].

Dallas & Mavis contends that the Union presented no evidence that employees used by Dallas & Mavis as trainers and to replace absentees deprived an employee from filling a vacancy in the decking operation and that the significance, if any, of the use of

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4. *See. e.g.*, Safeway Stores, 87 LA 606 (1986) (Gentile, Arb.); FRP Co., 90 LA 1106 (1988) (Statham, Arb.).

5. *See* Creasey Co., 71 LA 789 (1978) (Modjeska, Arb.).

6. *See e.g.*, Riley Stoker Corp., 7 LA 764 (1947) (Plant, Arb.); Great Lakes Dredge & Dock Co., 5 LA 409 (1946) (Kelliher, Arb.).

7. *See. e.g.*, Brown & Sharpe Mfg. Co., 11 LA 228 (1948) (Healy, Arb.); Mechanical Products, 73 LA 569 (1979) (Shaw, Arb.).

such personnel "is collateral to the issue of the proper interpretation of the collective bargaining agreement".

Dallas & Mavis contends that because it in good faith took the position from the outset that it was obligated to staff the yard and decking operations under the seniority transferability provisions of article 26 and the additional help provisions of article 39, section 4 of the 1988 Driveaway supplement and based its position on the National Arbitration Committee's rejection of the predecessor provisions of subsections 4(c) and 5(a) of article 5 regarding rights of former TSI employees, it acted in good faith with respect to the staffing of the decking and mounting operations at the KTP; that there is no basis in the record to support a claim that Dallas & Mavis acted in an arbitrary or bad faith manner; and that an award of a monetary remedy would not be appropriate.[8]

Dallas & Mavis requests the Board of Arbitration deny the Union's claim regarding the right of Allied Systems' employees to exercise their full terminal seniority to fill all the yard positions at Dallas & Mavis' KTP facility thereby obtaining seniority rights greater than those of the Dallas & Mavis employees at that facility.

ALLIED SYSTEMS

Allied Systems contends that the issue to be resolved by the Board of Arbitration is that regarding which the National Arbitration Committee deadlocked at its March 22-23, 1990 meeting.

On the basis that it was made clear during the arbitration

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8. Burnside-Graham Ready Mix, 86 LA 972 (1986) (Wren, Arb.); Purity Baking Co., *supra* footnote 3.

hearing that neither the Union nor any of the various persons who testified sought any relief against Allied Systems, Allied Systems "believes that it is unnecessary and inappropriate for it to take a position on the merits of the instant case and therefore declines to do so."

DISCUSSION

The issues to be resolved in the present arbitration, derived from the motion regarding which the National Arbitration Committee deadlocked during its March 22-23, 1990 meeting, are whether Dallas & Mavis violated the 1988 National Agreement and/or any supplement or local rider thereto when it refused to employ employees laid off by Allied Systems from Yard and Shop jobs at the KTP and first offered such jobs to Drivers employed by it at the KTP and then to other of its employees laid off from locations outside Louisville and, if so, what shall the remedy be. A majority of the Board of Arbitration find that Dallas & Mavis did so violate the 1988 National Agreement and therefore directs the remedy set out hereinafter. The Chairperson's reasoning follows.

APPLICATION OF ARTICLE 5 OF THE 1988 NATIONAL AGREEMENT

"Company seniority", "terminal seniority", "dovetail seniority", and "terminal" are each defined in article 5, section 1 of the 1988 National Agreement. Because of the clarity of those definitions, they need not be discussed here.

Section 2 of article 5 provides that terminal seniority rights for all employees covered by the 1988 National Agreement shall prevail unless supplements thereto or other provisions thereof specifically provide to the contrary. That the persons whom Allied

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Systems laid off from their former Shop and Yard jobs at the KTP in March 1990 were "covered" by the 1988 National Agreement at all times pertinent to the present case is undisputed. But the fact that Allied Systems' employees were covered by the 1988 National Agreement does not by itself provide a sufficient foundation for this Board to direct the dovetailing of seniorities sought by the Union. The second paragraph of section 2 provides that the extent to which seniority shall be applied as well as the methods and procedures of such application shall be set forth in the 1988 National Agreement and in Supplemental Agreements including approved Local riders. Therefore to determine whether employees laid off by Allied Systems from the KTP were entitled to exercise their terminal seniority one must review at least some provisions of the 1988 National Agreement and of the 1988 Driveaway Supplement.

As stated in section 6 of article 5 of the 1988 National Agreement, sections 1 through 5 of that article restate in part section l of the 1985 National Agreement and its predecessors and practices developed thereunder. Section 3 of article 5 of the 1985 National Agreement and its predecessors appears as section 8 of article 5 of the 1988 National Agreement.

Subsection 4(c) of the 1988 National Agreement, derived from article 5, subsections l(a)(1) and (2) of the 1985 and earlier National Agreements, provides in pertinent part for the dovetailing of seniority lists when two or more employees share traffic from the same shipper at the same location and "the traffic of one (1) of the Employers is cancelled by the shipper and . . . is assigned to one (1) of the remaining Employers" regardless of the existence or nonexistence of any financial transaction between the two employers. Subsection 5 (a) of article 5 of the 1988 Agreement, derived at least in significant part from article 5, subsection l(c)(2) of the 1985 National Agreement (identified as subsection 1(3) (b)

of the 1982 National Agreement), provides for the dovetailing of seniorities of specified employees in accordance with their respective company seniorities "[i]n the event a shipper cancels its business relationship with an Employer at a location . . . and transfers all or part of that business to another Employer which is not servicing that shipper at that location" again regardless of the existence or nonexistence of any financial transaction between the employers. Section 8 of article 5 of the 1988 National Agreement sets forth an acknowledgement that the "rules" found in sections 2 through 7 of article 5 "are intended solely as general standards" and an agreement that there may be factual situations which would necessitate modification or amendment of those rules as applied. Section 8 specifically authorizes the National and Area Joint Arbitration Committees to dispose of questions of seniority in accordance with the acknowledgement and agreement summarized in the immediately preceding sentence. The final paragraph of article 27 of the 1988 National Agreement provides that employees may carry over their terminal seniorities in certain situations. The issue of "Additional Help" is specifically addressed in article 39, section 4 of the 1988 Driveaway Supplement. That issue and its handling in accordance with an applicable supplement is referred to in a number of provisions of the 1988 National Agreement, for example, subsection 5(b) of article 5.

Article 7, section 9 of the 1988 National Agreement sets forth the powers of and limitations imposed on the present Board of Arbitration. Subsection (b) specifically provides that the Board "shall have the authority to . . . apply the provisions" of the 1988 National Agreement. In accordance with that provision the Board has the authority to apply article 5, section 8 of that Agreement in an appropriate situation.

That the facts of the present case do not fall squarely within

subsection 5(a) of article 5 of the 1988 National Agreement is clear. That subsection relates to situations wherein a shipper cancels its business relationship with an employer (in this case Allied Systems) at a location and the succeeding employer (in this case Dallas & Mavis) had not been servicing that shipper at that location. That Ford did not cancel its entire business relationship with Allied Systems at the KTP in March 1990 cannot be rationally disputed. Despite having lost the yard and mounting work, Allied Systems continued to receive traffic from Ford at the KTP. Moreover, Dallas & Mavis had been servicing Ford at the KTP prior to March 1990. But because the facts of the present case do not fall squarely within subsection 5(a) does not necessarily mean that the subsection should be completely ignored. In its decision regarding the cases which grew out of Ford's 1988 realignment of carriers from the LAP and KTP and which were heard during its April 11-14, 1988 meeting (docket nos. 200 (a), 206 (a), and 207 (a)) (hereinafter referred to as the "April 14, 1988 Decision") the National Arbitration Committee was careful to avoid stating that subsection 1 (c) (2) of article 5 of the then effective 1985 National Agreement had no application. Rather the Committee stated that that provision (as well as others) did not "fully answer" the specific facts and did not "totally apply". The Committee also found that subsection 2 (a) (3) of article 5 of the 1985 National Agreement (subsection 7(a) (3) regarding the opening of a new terminal in the 1988 National Agreement) was not "fully applicable" because Ford had cancelled "its business relationship in part with Motor Convoy" and added Dallas & Mavis as an additional carrier. As discussed more fully below, the Committee found that the partial applications of the cited provisions coupled with the adverse effect which the realignment had on Motor Convoy's Drivers provided an adequate rationale for application of section 3 of article 5 of the 1985 Agreement (section 8 of article 5 of the 1988 National Agreement).

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Whether the facts of the present case do or do not fit within the literal meaning of subsection 4 (c) of article 5 of the 1988 National Agreement is less clear. On the one hand it is arguable that subsection 4(c) does not apply in the present case because Ford did not cancel all of Allied Systems' traffic from the KTP but only effected a reallocation. On the other hand, one could argue that unlike subsection 5 (a), subsection 4 (c) does not relate to cancellation of a business relationship between a shipper and an employer but rather relates to cancellation of traffic, that although Allied Systems retained some traffic from the KTP after March 1990, the traffic which it retained was entirely different in kind from the yard and mounting work which it lost and that the yard and mounting work should therefore be viewed as "traffic cancelled" within the meaning of subsection 4 (c). The Board of Arbitration need not determine which of those interpretations is proper because, even if it were to determine that the facts of the present case fell outside the literal meaning of subsection 4 (c), it would be proper to extend application of that subsection in accordance with section 8 of article 5.

Neither arbitrators nor boards of arbitration are legally *required* to apply the decisions of earlier arbitrators or boards. But it is well established in labor arbitration that prior arbitral decisions should be followed except where there is a good reason to do otherwise. Following earlier decisions promotes labor stability and avoids relitigation of ide tical issues to the benefit of employers and unions alike. In accordance with that norm, this Board of Arbitration should be guided by the National Arbitration Committee's April 14, 1988 Decision. In that case and in the present case Ford's realignment resulted in a partial cancellation of Allied Systems' former business and adversely impactly. The present case may represent an even more appropriate situation to apply article 5, section 8 than the 1988 realignment because Allied

Systems' involvement in a distinct kind of work, that is, yard and mounting, was completely terminated as a result of the 1990 realignment whereas the delivery of vehicles was reallocated as a result of the 1988 realignment. The difference between the 1988 and 1990 realignments is that in 1988 Dallas & Mavis' situation approached that a new carrier at the KTP. Before the 1988 realignment Dallas & Mavis had had only four Drivers working from the KTP whereas shortly before the 1990 realignment it had over 80 Drivers on its KTP seniority list. That difference underlies the National Arbitration Committee's decision to extend the predecessor of article 5, subsection 5 (a) of the 1988 National Agreement rather than the predecessor to subsection 4 (c) of that article. That difference does not provide a basis for declining to follow the Committee's decision. In short, respect for the National Arbitration Committee's April 14, 1988 Decision requires application of section 8 of article 5 of the 1988 National Agreement in the present case.

Neither the National Arbitration Committee's decision reached during its October 17-19, 1988 meeting to maintain the Motor Convoy and Dallas & Mavis KTP seniority lists as they existed on October 18 of that year (hereinafter "October 19, 1988 Decision") which in effect reversed its decision that 14 Motor Convoy employees were entitled to first priority with Dallas & Mavis nor the Committee's decision reached during its April 11-14, 1988 meeting that Motor Convoy was not required to recognize TSI's employees' seniorities provide a reasonable basis for reaching a different conclusion. The Committee's decision to reverse its award regarding the rights of 14 Motor Convoy Drivers was clearly based solely on the Committee's being persuaded during its October 17-19, 1988 meeting that its earlier finding that Motor Convoy's employees had been adversely affected was wrong as a matter of fact. Nothing contained in the Committee's October 19, 1988 Decision can reasonably be understood as a

repudiation or retreat from the rationale of its April 14, 1988 Decision. The situation in which TSI's employees were following the 1988 realignment was quite different from that in which Allied Systems' employees were following the 1990 realignment. TSI's employees had been performing rail loading work. No such work existed after the 1988 realignment. The yard and mounting work which Allied Systems' employees had been performing prior to the 1990 realignment continued unabated after that realignment, however.

Even if one ignores that part of the National Arbitration Committee's April 14, 1988 Decision which relates to the rights of Motor Convoy's Drivers, the facts of the present case call for application of section 8 of article 5 of the 1988 National Agreement. Allied Systems' yard and mounting employees were certainly adversely affected by Ford's realignment of the third party work, and they were very experienced in such work while Dallas & Mavis' employees were not. By and large Allied Systems' employees had significantly greater terminal and company seniorities than Dallas & Mavis' employees had. Finally, one must give significant weight to the statement in article 5, section 8 that the "rules" set forth in sections 2 through 7 of that article are intended as "general standards". If subsection 4 (c) of article 5 set forth a general standard or guideline, then the result provided for in that subsection should be reached in the present case. It is highly doubtful that the drafters of the 1988 Agreement would have intended different results in cases of total cancellation of one employer's business and of partial cancellation expecially where, as in the present case, the partial cancellation related to all of a unique type of work.

Decisions cited by Dallas & Mavis in its post hearing brief other than those regarding Ford's 1988 realignment of traffic at the KTP discussed above may be treated more briefly. The National

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Arbitration Committee's decision regarding Ford's 1980 realignment predate significant amendments to many of the provisions set forth in article 5 of the 1988 National Agreement and therefore provide little guidance regarding resolution of the present case. The National Arbitration Committee's decisions in docket no. 13 of its February 8-10, 1983 meeting (Tab 3 to Dallas & Mavis' post hearing brief) and of docket no. 200 (a) of its April 28-30, 1987 meeting (Tab 7 to Dallas & Mavis' post hearing brief) are each distinguishable in that the factors present in those cases which weighed against dovetailing are absent in the present case. The result reached in this case is consistent with the Committee's decisions in both of those earlier cases to apply article 5, section 3 (now article 5, section 8) to avoid the literal application of specific provisions of article 5, of course. In its decisions in docket no. 213 (a) of its October 14-16, 1985 meeting (Tab 4 to Dallas & Mavis' post hearing brief) the National Arbitration Committee decided to apply the language of the then effective National Agreements from which article 5, subsection 5 (a) of the 1988 National Agreement was derived. Because that language now provides for a dovetail on the basis of company seniorities and because of the unique facts of the present case, following those decisions would produce a result virtually identical to that reached herein. The National Arbitration Committee's decision in docket nos. 11 and 12 of its February 8-10, 1983 meeting (Tab 3 to Dallas & Mavis' post hearing brief) is factually distinguishable in that that case involved different facilities. The facts of that case were well beyond any reasonable application of the language which appears as article 5, subsection 4 (c) of the 1988 National Agreement. Similarly, the committee's decision in docket nos. 215 (a) and 216 (a) at its July 22-24, 1986 meeting (Tab 5 to Dallas & Mavis' post hearing brief) is distinguishable. The Committee noted that the Drivers who sought to follow work diverted by the shipper from one carrier to another had not "regularly and consistently" enjoyed that traffic prior to the realignment. The facts of the present case are entirely different.

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Allied Systems' employees had performed the yard and mounting work at the KTP for many years before March 1990. The Committee's decision in docket no. 108 of its October 20-22, 1986 meeting (Tab 6 to Dallas & Mavis' post hearing brief) is distinguishable in that that case involved a shipper's closing of its plant and article 5, subsection 2 (b) (3) of the then effective 1985 National Agreement. The present case does not involve a plant closing, and subsection 2 (b) (3) of article 5 clearly has no application.

In summary, in accordance with article 5, subsection 4 (c) and section 8 of the 1988 National Agreement Dallas & Mavis was required to dovetail its KTP seniority list with that of Yard and Shop employees laid off by Allied Systems at the KTP in accordance with their respective terminal seniorities when it began its yard and mounting operation at the KTP and to offer jobs in that operation to employees on that merged list in seniority order. Dallas & Mavis did not do so and thereby violated the 1988 National Agreement.

APPLICATION OF "ADDITIONAL HELP" PROVISIONS OF THE 1988 NATIONAL AGREEMENT AND 1988 DRIVEAWAY SUPPLEMENT

Dallas & Mavis has cited the Board to no provision of the 1988 National Agreement which specifically required application of "Additional Help" provisions in the circumstances which existed at the KTP following Ford's March 1990 realignment of traffic. Article 39, section 4 of the 1988 Driveaway Supplement entitled "Additional Help" provides that certain procedures shall be used "[w]hen additional help is needed by any Employer at a terminal, over and above that provided for" in article 5, subsection 7 (a) of the 1988 National Agreement. Because, as discussed above, Dallas

& Mavis was required to dovetail its and Allied Systems' KTP seniority lists and hire Allied Systems' employees accordingly and did not do so, it cannot be said that Dallas & Mavis needed additional help at the KTP in March 1990 or later. Therefore article 39, section 4 of the 1988 Driveaway Supplement was inapplicable.

OTHER ALLEGED CONTRACTUAL VIOLATIONS

The Union contends that Dallas & Mavis violated the 1988 National Agreement by using employees whom Union and Dallas & Mavis' witnesses referred to as "floaters". Because resolution of that issue would not change the remedy directed hereinafter, the Board of Arbitration may and will refrain from deciding it.

The Union contends that Dallas & Mavis' hiring of employees whom Dallas & Mavis considered as "casuals" violated the 1988 National Agreement. Dallas & Mavis, on the other hand, contends that the use of such employees to cover absences by regular employees was in accordance with its usual custom and practice and not violative of the 1988 National Agreement. Analysis of material submitted by Dallas & Mavis to the Board of Arbitration subsequent to the arbitration hearing as arranged during the hearing shows that Dallas & Mavis utilized a total of nine such persons between May 19 and August 25, 1990 and paid such persons gross wages totalling in excess of $34,000.00. The total of gross wages paid over a relatively short period of time strongly evidences the existence of one or more full-time positions. Moreover, Dallas & Mavis has cited the Board to no provision of the 1988 National Agreement which provides for the use of such "casuals". Assuming — without deciding — that Dallas & Mavis' use of part-time employees to cover the absences of regular employees was in accordance with the 1988 National Agreement and further assuming — again without deciding — that Dallas &

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Mavis was not required to offer such part-time jobs to employees on its and Allied Systems' merged KTP seniority list, Dallas & Mavis was at a minimum required to fill such part-time jobs in accordance with article 3, subsection 1 (c) of the 1988 National Agreement. The evidence in the present case strongly suggests that Dallas & Mavis did not afford persons laid off by Allied Systems "a good faith opportunity for employment" before it hired other persons as "casuals".

REMEDY

Having determined that Dallas & Mavis violated the 1988 National Agreement by not offering jobs in its yard and mounting operations at the KTP to employees laid off by Allied Systems in accordance with such employees' positions on a merged seniority list, the Board must at a minimum direct Dallas & Mavis to make such a seniority list as of March 5, 1990, the first day it began yard and mounting operations at the KTP, and to offer jobs in that operation to employees on that list in accordance with their relative seniorities. The more difficult question is whether Allied Systems' employees who accept such jobs with Dallas & Mavis are entitled to backpay. Dallas & Mavis contends that because it acted in good faith, Allied Systems' employees are not entitled to backpay. Assuming — without deciding — that backpay is an inappropriate remedy in the event an employer violates employees' seniority rights in good faith, backpay is nonetheless proper in the present case. The facts of the present case are such as to leave serious doubts in the minds of reasonable persons regarding whether Dallas & Mavis acted in good faith or out of a perceived self-interest in obtaining a younger workforce. Dallas & Mavis totally ignored the National Arbitration Committee's decision closest to the facts in the present case, that is, the April 14, 1988 Decision wherein the Committee required Dallas & Mavis to give the first opportunity for work at the KTP to 14 Motor Convoy employees.

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As noted above, if Dallas & Mavis had simply followed that decision in the present case, it would have dovetailed seniorities on the basis of company seniorities which would in turn have produced a result virtually identical to that directed in the Award below. In relying on the National Arbitration Committee's decision regarding former TSI employees Dallas & Mavis conveniently ignored the fact that the work which those emloyees had previously done was no longer being performed at the KTP. Wholly without regard to testimony by one witness regarding alleged vulgar remarks, Dallas & Mavis' use of floaters and hiring of "casuals" without consideration of employees laid off by Allied Systems raises a question regarding whether Dallas & Mavis was acting in good faith toward employees laid off by Allied Systems. One must ask why an employer would hire an inexperienced employee from the street when that employer could obtain an employee with several years of experience in the very job being filled. In short, even if good faith constitutes grounds for avoiding a monetary remedy, a monetary remedy is appropriate in the present case and will be directed.

AWARD

Having heard or read and carefully considered the evidence and arguments in the present case a majority of the Board of Arbitration finds that at the commencement of its yard and mounting operations at the KTP on March 5, 1990 Dallas & Mavis was required by article 5, subsection 4 (c) and section 8 of the 1988 National Agreement to merge its KTP seniority list with that of employees laid off by Allied systems from yard and mounting jobs at the KTP and to offer jobs in its yard and mounting operations at the KTP to employees on that merged seniority list in accordance with their respective seniorities. The Board further finds that because Dallas & Mavis did not effect such a merged seniority list and did not offer jobs in its yard and mounting operations at the

Appendix E

KTP in accordance with such a list, Dallas & Mavis violated the provisions of the 1988 National Agreement cited in the immediately preceding sentence. To remedy this violation the board of Arbitration directs Dallas & Mavis (1) to prepare a merged seniority list of its KTP employees and of employees laid off by Allied Systems from yard and mounting jobs at the KTP on the basis of KTP terminal seniorities as of March 5, 1990, (2) to offer jobs in its "third party"/yard and mounting operations at the KTP to employees on that list in seniority order, (3) and to make whole all former Allied Systems' employees who accept such jobs offers for the time they were unemployed from March 5, 1990 until their employment by Dallas & Mavis in accordance with this Award. From any backpay due any employee because of this Award Dallas & Mavis may withhold an amount equal to the total of sums paid any such employee for unemployment compensation as a result of having been unemployed from March 5, 1990 until that employee was employed by Dallas & Mavis in accordance with this Award and sums earned by any such employee during that same period of time.

The Board of Arbitration will retain jurisdiction of the present grievance until March 14, 1991 to resolve disputes regarding the remedy directed herein, if any. If the Chairperson of the Board is notified by telephonic or other means of the existence of any such dispute on or before 4:30 pm., Central Time, on March 14, 1991, the jurisdiction of the Board shall be extended for as long as is necessary to resolve disputes regarding the remedy directed. If, on the other hand, the chairperson is not notified of any dispute by 4:30 p.m. Central Time on March 14, 1991, the jurisdiction of this Board of Arbitration shall then cease.

DATED: 14 December 1990

Appendix E

s/ Jack Clarke
Jack Clarke, Chairperson
P.O. Box 40837
Tuscaloosa, AL 35404
Phone (205) 556-7651
My File No. 1990-1315

I dissent:
s/ Eugene J. Sobie
Eugene J. Sobie -
Management Appointed Arbitrator

I concur:
s/ Charles J. Piscitello
Charles J. Piscitello -
Union Appointed Arbitrator